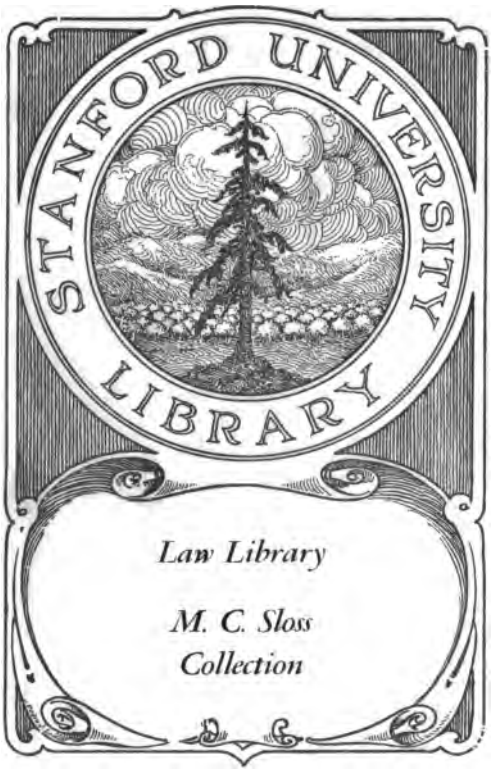
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THE SOUTH AUSTRALIAN LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF SOUTH AUSTRALIA.

EDITED BY

H. F. DOWNER,

A PRACTITIONER OF THE SUPREME COURT.

VOL. XII.—1878.

ADELAIDE:
W. K. THOMAS & CO., PRINTERS,
GRENFELL-STREET.

1880.

R. K. THOMAS, PRINTER, GRENFELL STREET, ADELAIDE.

JUDGES OF THE SUPREME COURT.

1878.

SAMUEL JAMES WAY, ESQ.	CHIEF JUSTICE.
EDWARD CASTRES GWYNNE, ESQ.	SECOND JUDGE.
RANDOLPH ISHAM STOW, ESQ. succeeded on 25th September by JAMES PENN BOUCAUT, ESQ.	THIRD JUDGE.

Primary Judge in Equity:

EDWARD CASTRES GWYNNE, ESQ.

ERRATA.

Page 1—After headnote, *read* "Appeal from Adelaide Local Court."

26, line 4—For "Contributing Liquidation" *read* "Contributory Liquidator's."

62, line 4—For "Part agreement" *read* "Parol agreement."

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THE

SOUTH AUSTRALIAN LAW REPORTS,

1878.

SUPREME COURT.

WAY, C.J., STOW, J.] [COMMON LAW.

12 DECEMBER, 1877.

G. CASTAGNETTI v. F. SANTI.

PERJURY.—Malicious Prosecution—Reasonable and Probable Cause—Two Witnesses—Hearsay Evidence.

If a person have hearsay evidence, from which he may reasonably believe that another has committed perjury, he is justified in prosecuting though he may not have the evidence of two witnesses, or such other testimony as will be sufficient to obtain a conviction.

RULE to enter a verdict for defendant or have a new trial.

The action was for malicious prosecution. Plaintiff was arrested on a charge of perjury and brought before the Police Magistrate, and the charge was afterwards withdrawn. The question was whether the defendant had reasonable or probable cause for assigning perjury against the plaintiff upon hearsay evidence of one witness.

Smith moved that the rule be made absolute.

Bundey showed cause.

Roscoe's Criminal Evidence (8th ed.), 834.

Proof must be by two witnesses. Here there was only one witness, and his evidence was of such a character as could not stand unsupported.

Per Curiam.—The defendant had hearsay information, before taking proceedings against the plaintiff, that the statement in his affidavit was untrue, from which he might reasonably believe that the plaintiff committed perjury. There was reasonable and probable cause for prosecuting.

Rule absolute with costs.

WAY, C.J., STOW, J.] [COMMON LAW.

12 AND 14 DECEMBER, 1877.

BAWHEY V. O'BRIEN.

LOCAL COURTS ACT, 1861.—*Appeal—Stay of proceedings—Recovery of money—Attorney.*

The defendant appealed from a verdict of the Local Court of Adelaide, but, in lieu of depositing with the Clerk of the Court the security required by the Act, paid into Court the amount of verdict and costs, which amount was, after notice of appeal, paid by the Clerk to the plaintiff's attorney by order of the Special Magistrate, and remained in such attorney's hands until a rule absolute for a new trial had been obtained, and notice thereof given to such attorney, when the plaintiff's attorney paid the money to his client.

Held—*That the attorney was liable personally to repay the money into Court.*

Quære—*Whether the Clerk of the Court was justified in paying the money to the plaintiff's attorney.*

RULE calling upon the Clerk of the Adelaide Local Court to show cause why he should not be ordered to pay over to the defendant or to his attorneys the amount of a verdict in this action, which he had paid out of Court to Mr. W. Villeneuve Smith, the plaintiff's attorney, by order of the Special Magistrate, after notice of appeal had been given by the defendant O'Brien. The money had been paid in to dispense with the usual security provided for in cases of appeal, and at the time the rule for a new trial was made absolute the plaintiff's attorney had the money in his hands, but had subsequently paid same to his client.

Ingleby, Q.C., for the defendant, moved that the rule be made absolute.

Symon, for the Clerk of the Court, showed cause.

STOW, J.—*Mr. Smith* ought to have retained the money when it was in his possession until the ultimate decision of the case.

Smith.—Yes; but I was compelled to hand over the money. The plaintiff demanded it, and I had no alternative.

STOW, J.—I think you made a mistake. It would have been exercising a wiser discretion to replace the money in the Local Court, and thereby relieve the Clerk of the Court, who is not to blame, as he paid it out under the direction of the Magistrate. I think the argument had better stand over until you come to some arrangement.

WAY, C.J.—The object of these proceedings is to get the money back into proper custody. It appears that this particular sum of money was in *Mr. Smith's* hands at the time the verdict was set aside by the rule being made absolute. There was no pretence for keeping it then; and because *Mr. Smith* chose to pay it over to the plaintiff, I don't see why the Clerk of the Court should be made the scapegoat.

Smith.—I was acting simply as the attorney for Bawhey. I only held that money as his agent.

STOW, J.—All I say is that you made a very great mistake. I can see no reason whatever why you might not in a proper proceeding be ordered to pay that money into Court.

Smith.—The Court having expressed that opinion, I shall pay back the money at once.

WAY, C.J., STOW, J.] [COMMON LAW.

18 MARCH, 1878.

CULLEN v. BICKERS.

Defendant wrote to plaintiff's agent, referring to the purchase of certain land, "As stated to our mutual friend I will take 5 and 6, or 6 and 7, at £45 each." Plaintiff's agent replied, "I have booked allotments 6 and 7, Port Vincent, to you, at £45 each, equal to £90; kindly forward cheque for £18 deposit, being at the rate of 20 per cent. in terms of condition of sale."

Later on plaintiff's agent, again wrote to defendant applying for amount of deposit, and asking what credit, if any, he required for the balance of the purchase-money.

The defendant replied to the above letters, "I return your account herewith. I am aware that some time ago I offered you a price for this land, but as it was not accepted at the time I am not inclined to purchase now."

Held—*That the acceptance imported terms not included in the offer, and that there was no binding contract between the parties.*

RULE to set aside the verdict and for a new trial, or to enter judgment, or to vary same in favour of the defendant.

The action which was tried in the Local Court, of Adelaide, was for a breach of a certain alleged contract contained in the following letters.

1. Letter dated 13th September, 1877, from defendant to Messrs. Wadham & Co., the plaintiff's agents, "As before stated to our mutual friend Luxmore, I will take 5 and 6, or 6 and 7, as before stated, at £45 each; more I will not give."

2. Letter dated 14th September, 1877, from plaintiff's agents to defendant, "I have booked allotments 6 and 7, of Port Vincent, to you, at £45 each, equal to £90. Kindly send cheque for £18 deposit, being at the rate of 20 per cent., in terms of conditions of sale."

3. Letter dated 27th November, 1877, from Messrs. Wadham & Co. to the defendant, applying for payment of deposit, and asking "what credit (if any) he would take for the balance of purchase-money."

4. Letter from defendant to Messrs. Wadham & Co., dated 28th November, 1877, "I return your account herewith; I am aware that some time ago I offered you a price for this land, but, as it was not accepted at the time, I am not inclined to purchase now."

At the trial a verdict was found for the plaintiff for £58 2s. 6d.

Ingleby, Q.C., having obtained a rule *nisi*, as above-mentioned, now moved that such rule be made absolute.

The *Attorney-General (Mann, Q.C.)* showed cause.—The contract was complete. Defendant made an unconditional offer, which was unconditionally accepted. The mention made of "conditions of sale" at the end of the letter of September 14th, had nothing to do with the acceptance.

STOW, J.—We do not know upon what terms the rest of the purchase-money was to remain except we refer to the conditions of sale.

WAY, C.J.—Suppose the purchaser had complied with the terms of that letter and sent the deposit, do you think he could enforce the conditions of sale?

STOW, J.—What does a deposit mean but that the rest of the money is to stand over for some time? (*Crossley* v. *Maycock*, L.R., 18 Equity, 180.)

WAY, C.J.—I don't think we need call on you, *Mr. Ingleby*, to reply. In my opinion the parties in this case were never *ad idem*. There was an offer to sell upon terms stated to "our mutual friend Luxmoore." It does not appear what those terms were, and the acceptance imports the terms of the conditions of sale which were not included in the offer. I think it would be useless under these circumstances to direct a new trial.

STOW, J., concurred.

Rule absolute with costs.

WAY, C.J., STOW, J.] [COMMON LAW.

25 MARCH, 1878.

BAKER v. DENMAN.

BREACH OF PROMISE.—Married Woman—Absence for more than seven years—Presumption of death—Misdirection.

To an action for breach of promise of marriage the defendant pleaded that the defendant was a married woman, whose husband was still alive.

The evidence showed that twenty-one years before action the plaintiff had separated from her husband, and sued him for maintenance; that she had not since seen or directly heard from or of her husband, but that three years after his disappearance he had been seen in Victoria by plaintiff's brother, who stated that plaintiff's husband then avoided him.

At the trial the Special Magistrate in effect directed the jury that whether the presumption of death had arisen or not, since these circumstances of the husband's disappearance were known to the defendant at the time of the marriage contract the plaintiff was entitled to recover.

Held—1. *That under the circumstances there was no presumption that plaintiff's husband was dead.*

2. *That the Special Magistrate had misdirected the jury.*

RULE for a new trial, or a nonsuit, or to enter a verdict for the defendant.

The action was laid in the Adelaide Local Court, where a verdict was found for the plaintiff for £50.

The facts were as stated in the head-note. On moving for the rule the following cases were cited:—

Prudential Ass. Co. v. *Edmonds*, L.R., 2 App. Cas. 487
Doe v. *Andrews*, 15 Q.B., 756
Watson v. *England*, 14 Sim. 28.

J. W. Downer now moved that the rule be made absolute.

Ingleby, Q.C., showed cause.—The question was one of fact for the jury.

Taylor on Evidence (7th ed.), par. 199.

All the circumstances pointed to the presumption of death. The husband was drunken and not likely to live eighteen years. I cannot say anything about misdirection, for I do not understand the direction.

Per Curiam.—There was no presumption of death raised, and the direction to the jury was incorrect in point of law.

Rule absolute for a new trial with costs.

WAY, C.J., STOW, J.] [COMMON LAW.

25 MARCH, 1878.

ENDERSBY V. THWAITES.

SPECIAL CASE.—Illegal distress—Rent due—Evidence.

A Special case stated;

That the defendant, being the plaintiff's landlord, seized under distress warrant certain tools and utensils of the plaintiff used by him in the way of his trade as a wheelwright, but not in actual use at the time of seizure; that without taking such tools and utensils there were not sufficient goods on the plaintiff's premises to satisfy the distress.

The question submitted was whether, on the above facts, the seizure was lawful.

Held—*That, as there was no evidence that any rent was due, there was no justification for the seizure of the goods.*

SPECIAL case from the Local Court, Port Adelaide.

The action was to recover £25 16s. Defendant was landlord of certain premises let to and occupied by one Liddell; and the plaintiff sued the defendant for that she took possession of and distrained on certain tools and utensils of the plaintiff used by him in the way of his trade as a wheelwright in the employ of Liddell aforesaid, and that defendant wrongfully converted the said property to her own use, and unlawfully deprived the plaintiff of their possession. Defendant pleaded not guilty by Statute; no indebtedness; and denied that the goods were the plaintiff's. The Court found that there were not sufficient goods on the premises of Liddell to satisfy the distress warrant without taking the goods forming the subject of this action, and that none of the latter were in actual use by the plaintiff when seized. A verdict was therefore given for the defendant, subject to the opinion of the Supreme Court as to whether there was any justification for the seizure of the goods in question. Should the Supreme Court answer in the affirmative, the verdict to stand; otherwise to be set aside, and a verdict entered for plaintiff with £20 damages.

Sheridan, for the plaintiff.—It was absolutely necessary to prove that some rent was due in order to justify the seizure, and there was no such evidence.

Symon, for the defendant.—Looking at the finding of the Court, the answer must be in favour of the defendant. At the hearing before the Magistrates the point referred to this Court was whether on the facts as disclosed in the evidence the finding was correct. The whole question was whether these goods were tools or implements of trade in use, and should have been exempt from distraint, being "privileged." The point now taken as to there being no evidence of the rent being due was not raised on the trial. In order to do justice the case should be sent back.

STOW, J.—You set aside all legal principles on an assumption that rent was due in this case.

WAY, C.J.—Our answer is in the negative, that there was no justification for the seizure of the goods.

Case answered in the negative.

WAY, C.J., STOW, J.] [COMMON LAW.

25 MARCH, 1878.

MARSHALL v. DAVIS.

PURCHASE ON CREDIT.— Time Payment—Default—Penalty—Conversion.

Plaintiff sold defendant a piano on the usual time payment terms, the agreement providing that on default in due payment of any of the instalments, or on breach of any of the conditions of the agreement, the plaintiff should be entitled to the return of the piano, and the defendant forfeit all claim thereto.

The defendant, contrary to the agreement, removed the piano from his dwelling house, and made default in payment of the instalments whereupon the plaintiff demanded the piano and on refusal brought an action against the defendant for conversion of the same.

The defendant paid into Court the arrears of instalments and pleaded that the piano was his property.

Held.—*That there was a breach of the agreement entitling the plaintiff to possession of the piano and a verdict in his favour.*

SPECIAL case from Local Court of Adelaide.

The action was to recover £70, the value of a certain piano, the property of the plaintiff, wrongfully converted to his own use by the defendant, who pleaded, not guilty, and that he contracted to purchase the piano on credit, which credit had not expired; that he had always been willing and ready to pay in accordance with the terms of that contract; that the balance due to date under the contract had been paid into court, and the plaintiff exonerated him from making the monthly payments on the several dates mentioned in the said contract. The facts were as stated in the head-note. At the trial a verdict was found for the plaintiff for £53 9s., to be reduced to 1s. on the return of the piano, subject to the opinion of the Supreme Court, whether on the facts the plaintiff was entitled to recover.

Smith, for the defendant.—The plaintiff should have been non-suited. The power to terminate the agreement and resume

possession on payment of quarter of the money payments being penal, the plaintiff's claim was satisfied under the authority of

Kemble v. *Farren*, 6 *Bing*, 141,

by payment of the amount due at the date of the action; the piano was the defendant's property—

Barber v. *Callow*, 13 L.T., N.S., C.P., 130
Mayne on Damages, 3rd ed., 128.

Symon, for the plaintiff, was not called on.

STOW, J.—In this case it is quite clear there was a breach of agreement by the defendant, entitling him to the possession of the piano.

WAY, C.J.—The answer will be in favour of the plaintiff. The decision of the Court below was right.

Case answered in favour of the plaintiff.

28 AND 29 MARCH, 1878.

KRUSE v. LIGHT AND ANOTHER.

INTERIM ORDER.—Irregularity—Suppression of material facts—Redemption Suit—Bill.

An action of ejectment having been commenced by the defendants as mortgagees against the plaintiffs, who were mortgagors, to recover possession of certain land, the plaintiffs filed a bill in Equity for redemption of the land and obtained an interim order restraining the defendants in the suit from proceeding with their action of ejectment until the hearing. The Bill was demurrable on the face of it, for the reason, amongst others, that it contained no offer to do equity; and there was time after the commencement of the action of ejectment for the plaintiff to have filed his Bill, and obtained an interlocutory injunction before the trial of the action.

Held—*That the interim order must be discharged.*

Semble—*That the interim order was bad in restraining the defendants from proceeding until the hearing instead of until a fixed date.*

MOTION to discharge an interim order.

The suit was for redemption of certain land in respect of which the present defendants, as mortgagees, had brought ejectment against the present plaintiff as mortgagor in default.

The bill alleged that the mortgage debt and interest had been paid by the plaintiff to the defendant, Nevile, in cash and bills, and that at the time of such payment the plaintiff signed an application to have the land brought under the provisions of the Real Property Act, 1861, subject to the mortgage.

The bill contained no offer to do equity. On filing the bill the plaintiff applied for and obtained, *ex parte*, an interim order restraining the defendants from proceeding with the ejectment until the hearing; but it appeared that, had the plaintiff used due diligence he might have filed his bill, and obtained an interlocutory injunction before the trial of the ejectment.

Symon, for the defendant, now moved that the interim order be discharged with costs on the following grounds, namely, irregularity

on the face of it, suppression and concealment of material facts and documents, misstatement of facts, delay in applying, and on the merits particularly that no sufficient case was made by the bill, which was demurrable. The order is bad on the face of it, as it restrains the ejectment until the hearing of this suit instead of merely to a short date certain—

Joyce on Injunctions, 1304-5
Daniel's Practice (5th ed.), 1519.

(WAY, C.J.—This order which you attack is as extensive as an interlocutory injunction obtained upon notice and after argument. It certainly seems irregular ; but what is the penalty of that? I should be sorry to discharge the order on that ground alone.) I apprehend the penalty is the usual one in cases of irregularity namely, that the irregular proceeding is set aside with costs. It appears the plaintiff seeks a reconveyance of the land, on the ground that he paid the amount to Mr. Nevile in June, 1876, by £25 in cash and £75 by three acceptances for £25 each. The bill itself, however, shows that the money due upon the mortgage was advanced by the defendants, who were trustees, on joint account. Payment in cash, therefore, to one of the mortgagees without the authority of the other, would not discharge the security, much less the giving of bills, which it seems Nevile appropriated to his own use. The giving of these bills was not intended to discharge the mortgage, because at that very time Kruse signed an application to bring the land under the Real Property Act, subject to the mortgage. There is no equity to maintain this suit. (WAY, C.J.—Is there any offer to do equity?) No, and that is the next point I take. The bill is altogether bad and demurrable—

Kerr on Injunctions, 613, 620, 630, 635
Mollett v. *Enequist*, 25 Beav. 609, 26 Beav. 466
Joyce on Injunctions, 1305
Fuller v. *Taylor*, 32 L. J. Ch., 376
2 Daniels, 5th ed., 1517.

WAY, C.J.—Before the argument proceeds further I desire the points already taken disposed of. With regard to the irregularity.

I should feel disposed, if I had the power, to amend, to give the defendant the costs of the motion. As to the other points, I should like to know whether counsel for the plaintiff think they can resist them.

Bundey, Q.C., and *Kingston*, for the plaintiff.—We admit the bill should have contained an offer to do equity, but an amendment may be allowed without prejudice to the injunction.

WAY, C.J.—The practice of amendment does not apply to proceedings in the stage this motion has reached. The question is whether at the time the order was made the bill was sufficient to support it, and it was not if as is conceded it was then demurrable. I shall, therefore, on the grounds taken, discharge the interim order, and with costs, as it appears from the dates sworn to, that there was ample time before the date fixed for the trial of the ejectment for the plaintiffs to have given notice of motion for injunction, without seeking an interim order at all.

Interim order discharged with costs.

WAY, C.J., STOW, J.] [COMMON LAW.

18 MARCH, AND 1 APRIL, 1878.

MACKAY v. GIBSON.

IMPOUNDING.—Public yard—Trover.

The plaintiff, with the defendant's knowledge, put his horse in a public yard belonging to the defendant.

The horse was an entire, and it was alleged, served a mare also in the yard.

Thereupon the defendant impounded the horse.

Held.—*That there was a conversion of the horse by the defendant, and that the plaintiff was entitled to recover its value.*

APPEAL from the Melrose Local Court.

The action was for wrongful conversion of an entire colt; and at the trial the plaintiff was nonsuited. The facts were as stated in the head-note.

J. W. Downer, for the plaintiff, having on the 18th of March obtained a rule *nisi* to set aside the nonsuit and for a new trial, now moved that such rule be made absolute.

Smith, for defendant, showed cause.—The colt was impounded because it was trespassing. (WAY, C.J.—Do you mean to say that if I go to a public-house and put my horse in the public yard it may be impounded for trespassing?) In a case like the present, where the horse is an entire and put in a yard where there are mares and fillies, I hold that it may be impounded—

Coulls v. *Willoughby*, 10 L.J., Ex, 367—marginal note.

The action here should have been for trespass, not trover. (STOW, J.—It does not matter whether the plaint is in trover or trespass; the Magistrate would be perfectly justified in finding for the plaintiff if there was trespass, even although there was no conversion.) (WAY, C.J.—I would go further and say he would be bound to give a decision.) (STOW, J.—Of course if there was trespass the

Magistrate was bound to give a verdict on that.) But I submit there was no trespass. (WAY, C.J.—There is no evidence whatever that this entire did the mischief to the mare.) (STOW, J.—There is only the defendant's statement that it took place at all. Do you mean to say if a man wrongfully impounded cattle that were not trespassing or doing any damage that an action against him would not lie in the Supreme Court.) I think an information under the Impounding Act would lie. (STOW, J.—Well, that is one way of doing it.)

Wylde v. *Waters*, 24 L.J., Ex., 193,

shows that refusal itself does not make conversion. (WAY, C.J.—Refusal is evidence of conversion, but that might be rebutted by the circumstances. Assuming that it was not conversion but a trespass, do you dispute that the plaintiff ought not to be nonsuited?) I do. The entire colt, being in a public yard and not under control, was doing a public wrong. (STOW, J.—There is a penalty provided for a case of that kind.) (WAY, C.J.—But can any of Her Majesty's subjects be justified in seizing an entire and shutting it up and not giving it up to the owner?) Yes—

Impounding Act, 1858, section 27.

(STOW, J.—There is no more a right to seize an entire than there is to seize any other horse in a public yard. Here it was known that the colt was run into the yard.)

WAY, C.J.—There will be a rule absolute; and our direction is that in point of law there was evidence which, if unanswered, entitled the plaintiff to a verdict.

Rule absolute with costs.

25 MARCH AND 2 MAY, 1878.

HARRISON v. BRITANNIA FIRE INSURANCE ASSOCIATION.

POLICY OF INSURANCE.—Renewal—Executory Contract—Breach—Damages—Agent.

Prior to the 2nd January, 1877, the plaintiff insured with the defendants certain premises from the 2nd January, 1877, to the 2nd January, 1878, and obtained a policy in the usual form, with the addition in the margin of the words "Renewable 2nd January, 1878."

Before the expiration of the policy M., the authorized Agent of the defendants, sent to the plaintiff, and also to L., the sub-agent, through whom the policy had been effected, reminding him that he was prepared to receive applications for renewal.

M. stated that by sending such a notice to the sub-agent, he intended him to negotiate a renewal at the old rate, and to obtain cheque for the premium, but that he (M.) still reserved to himself the right to accept or reject the risk.

On receipt of the above notice, M. saw the plaintiffs, arranged with them to renew, and not later than 11 o'clock on the morning of the 2nd January, 1878, obtained from them a cheque for the premium.

At 11.30 of the same day M. wrote and posted to the plaintiffs a letter, stating that he was prevented by arrangement with the Associated Companies from insuring at the old rate, but would be happy to renew at a higher rate mentioned.

Subsequently L. left the plaintiffs' cheque at M.'s office, which M. on the same day returned to L. with a memorandum in which he expressed his regret that a mistake had been made, which, he added, was from no fault of L.'s. The cheque, he said, must be for £60, not £40.

L. Thereupon wrote to the plaintiffs, forwarding them M.'s letter to him, but did not return the cheque.

The plaintiffs issued their summons on the 4th January, 1878, and on the same day, but after the summons was issued, L. handed the plaintiffs their cheque, which the plaintiffs refused to accept.

Held—(1) *That the policy was renewable at the former rate.*

(2) *That the negotiations between the parties, apart from the policy, amounted to a contract to renew.*

(3) *That the defendants had received the plaintiffs' cheque as cash, and were liable to them for the amount as for money had and received.*

(4) *That the contract was executory not executed, and that the plaintiffs were entitled to damages for its breach.*

RULE for a new trial, or for a verdict for the plaintiff.

The action, which was tried in the Adelaide Local Court, was for damages for breach of contract to insure, and for money had and received, and for money payable, and for money due on accounts stated. At the trial a verdict was found for the defendant without costs. The facts are stated in the head-note.

J. W. Downer, with *H. F. Downer*, moved that the rule be made absolute.

Boucaut, Q.C., showed cause.—The marginal note was merely a note of reference, and there was not a word in the policy about renewing. (WAY, C.J.—If the body of the policy contained a reference to renewing the insurance I think the marginal note might in that case be rejected as repugnant to it, but as it stands the note must surely have some meaning attached to it. On further examination I find that a period is mentioned in the body of the policy, and it elsewhere states—"This shall be an annual policy renewable on the 2nd January, 1878.") I submit that it does not amount to an agreement to renew. But even supposing we are wrong as to that the plaintiff is not entitled to a new trial, for there is no amount in dispute here in respect of which an appeal can lie. The amount sued for is £60. Now, the cost of renewing the insurance under the old rate would be £40, and the plaintiff says his damages are only £20; but he makes up his claim to £60, first by the amount of his £40 cheque which he tendered for the reinsurance, and secondly by the £20 damages which he alleges was the loss he sustained by a breach of contract. But the £40 was never accepted by the defendants. The same day it was received by the agent Lunn notice was given to the plaintiff of the increased rate, and that the cheque being insufficient it would be held to his use. On the 4th January, the same

day the action was brought, it was returned to the plaintiff, who, however, would not receive it back, and now it is in Court. It has never been cashed, nor has it ever been held by the defendants as cash. (WAY. C.J.—The question is whether it was taken by Lunn, as the authorized agent of the defendants, as cash. If it was, then of course the damages would really amount to £60.) Lunn returned the cheque. (*J. W. Downer.*—There is no plea of tender.) It is no question of tender, but whether or not you can force that cheque on us as money when it was returned and never held as cash. As a matter of fact no money has passed from the plaintiff to the defendants. The cheque is a mere piece of paper which was handed over to the defendants, who did not accept it. And I ask your Honor to say that the contention must be taken in our favour, for this very claim for damages goes on the assumption that the cheque was not cash; because if it was cash the plaintiff was then insured and no action lies against us for not insuring. But in reality we did not get the money. We broke the contract by refusing to receive the money two days before the action, viz., on the 2nd January. (WAY, C.J.—You say, in short, that the plaintiff is in this dilemma—the contract was executed, and therefore there was no breach; or it was not executed and no money was paid, the defendants refusing to accept the cheque as money, in which latter aspect the damages are only £20 and plaintiff is out of Court. But does not the refusal to accept amount to a breach of the policy itself, it being an intimation from the defendants that they will not pay any damage which might be incurred under that policy. Do you mean to say that the plaintiff would have to wait till his premises were burned down before he could test the value of his policy?) He could not recover more than £20. Allowing him the most favourable position and driving us to our worst position, the only damages he could claim would be £40 on the cheque and the £20 he has paid on another insurance. But on the very day that the cheque was paid to Lunn, and before action, he received notice that the defendants would not accept the cheque as cash. I submit that the money was not received, and this is clear when the plaintiff relies for damages on the fact that the defendants refused to accept it. (WAY, C.J.—I quite appreciate your argument, but I think that the defendants did treat the cheque as

cash, and only held it over for the additional £20. They say in substance "We have £40, we want £20 more.") No; they say, "You have sent us a piece of paper which we are willing to treat as cash if you send us £20 more." The letter from Meredith to Lunn returning the cheque shows that Meredith did not receive it as cash. (WAY, C.J.—Yes; if it had been communicated to the plaintiff that Meredith would not receive it, then I think your contention would be made out.) Meredith wrote to the plaintiff, before he received the cheque from Lunn, informing him of the higher rate of premium he would require to pay on his renewal. The most damages he can claim is £20 in respect of the extra premium, and the Local Courts Act takes away the right of appeal where the sum involved is so small. His Honor Mr. Justice STOW distinctly ruled in the case of the *Bank of South Australia* v. *Hulbert*, 10 S.A.L.R., 60, that a person cannot by claiming in his particulars of demand a larger amount than £30 obtain the right of appeal if the evidence clearly shows that he is entitled to a less amount. Also in the case of *Mayer* v. *Burgess*, 4 E. & B., 655, the Judge there said, "We must look at the real nature of the case, not at the amount claimed. It is clear that here as much as £30 could not be recovered." So that, even conceding the present case, I say it is answered by the circumstance that the amount is not appealable.

J. W. Downer, in reply.—The evidence showed beyond all question that the defendants did receive the £40. Meredith was the person appointed by the defendants to negotiate insurances, and he was for the purposes of the present case substantially the defendant. Lunn had the right to receive the money on receipt of the notice showing the amount for which the policy was to be renewed. That notice he received, and acting upon it he went to the plaintiff and took the cheque in question as payment. If the defendants had brought an action against the plaintiff in respect of the premium on that policy the plaintiff could have pleaded the cheque as payment. The evidence disclosed that the defendants did intend to reinsure the plaintiff, but just when the cheque was received by Meredith through his agent Lunn, Jessop, a member of the Associated Companies, was made cog-

nisant of the fact that the renewal was at the original rate, and he counselled Meredith to send back to the plaintiff and get the extra rate. Meredith accordingly wrote the letter to Lunn, returning the cheque and asking him to get the full amount of £60 required under the new rate. (WAY, C.J.—At present it strikes me that the defendants are in as good a position as though they had paid the £40 in Court, for before the action was tried it was sent back to the plaintiff.) Certainly not, your Honor; it was not returned till after the action. (WAY, C.J.—I think I am right in this fact, that before the trial—on the very day of the trial—the piece of paper representing £40 was back in your hands.) No, your Honor; that is just the point. It was on the same day, but after the summons was issued. I say that the claim must be measured by what we could recover when we brought the action. Unquestionably the defendants received the money, and they have not given it back to us. After the action a third person—not the defendants—offered us the cheque back, but we refused to accept it, and on that we say, "You took our cheque as money." The test of this appeal is what we were entitled to at the time we issued the summons.

WAY, C.J.—There are two points in this case—first, is the claim an appealable amount; and secondly, is the action maintainable? It appears to me, as *Mr. Downer* has pointed out and as *Mr. Boucaut* has admitted, that the question as to whether or not the claim is for over £30 must be tested not at the time of the trial, but at the time the action was brought; and the evidence is that this cheque was received as cash by the agent for the defendants, and there was nothing equivalent to a tender of it back again when the action was brought. I therefore think the appeal lies. Then, as to whether or not there was an executory contract to insure and a breach of that contract, it seems to me that a contract to reinsure can be made out by the nature of the transactions which took place between the parties, by the notice intimating there would be a renewal on receipt of the amount, and also by the terms of the policy itself. I was, however, much pressed by the argument of *Mr. Boucaut* that on payment of the £40 the contract was completed under the policy for a

further term of twelve months; but it appears to me on looking at the policy that the intention of the parties was that a new policy should be issued. Perhaps some little doubt can be thrown on that interpretation by the wording on the back of the policy; but looking at the circumstance that in the body of the policy the period is mentioned in express terms from the 2nd of January, 1877, until the 2nd of January, 1878, I think that the intention was to issue a new policy. Therefore, in my opinion, there was an executory contract to insure and a breach of that contract, and that the verdict was improperly found for the defendant. This Court has already decided that it has power to vary a judgment of the Local Court; and in this case the rule will be made absolute to enter a verdict for £20, with costs of appeal and costs in the Court below on the highest scale.

Rule made absolute with costs.

2 MAY, 1878.

SWINDEN v. CHARLES.

IMPOUNDING ACT, 1858.—*Prohibited purchase—Trover.*

A sale by a Poundkeeper to a member of the District Council of the district in which such pound is situated of cattle impounded passes no property in such cattle to the purchaser; and the original owner may maintain trover against the purchaser for the cattle so purchased by him.

RULE for a new trial.

The action was tried in the Local Court of Auburn, and a verdict found for the defendant.

A mare of the plaintiff's was impounded in the public pound at Saddleworth, and afterwards brought thereout by the defendant, he being then a member of the District Council wherein the said pound was situate. Plaintiff claimed to have the mare restored to him, and on refusal brought trover to recover its value.

Ingleby, Q.C., moved that the rule be made absolute.

The *Attorney-General (Mann, Q.C.)*, showed cause.—The 31st section imposed a penalty and created an offence unknown to the Common Law, and that penalty should have been sued for under Act 6 of 1850, which provided for the offence—

Wolverhampton New Waterworks Company v. *Hawkesford*, 29 L.J., C.P., 121.

(WAY, C.J.—But here there arises this difficulty, that there is a penalty and also something else—"and shall also restore the cattle purchased.") That is all a portion of the penalty in the Act. A very analogous case is that of *Stevens* v. *Jeacocke*, 11 Q.B., 731. The plaintiff could not recover unless he showed special damage—some peculiar injury beyond that which he might

be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law—

Chamberlaine v. *Chester and Birkenhead Railway*, 1 Ex., 870.

(WAY, C.J.—The purchaser incurs a penalty, and no property passing the plaintiff is entitled to recover possession. There may be a void purchase.) But if it is void it is no purchase, and the whole thing becomes a nullity. Besides, if the plaintiff goes for a penalty he must do so within six months of the offence—

Act 6 of 1850, Section 10;

and here the six months have expired.

WAY, C.J.—I think that under this statute when the sale is made to a Justice of the Peace, a member of the Corporation, or to a member of the District Council in which the pound is situated is no property passes, and the plaintiff is entitled to maintain trover. With reference to the very ingenious argument of the Attorney-General that the Act provides a remedy, that is disposed of by referring to the Act 6, of 1850, which is incorporated in the statute creating the offence. It is quite clear under that Act that there is no procedure whatever for the recovery of the property. There is only a procedure applicable to a conviction. Under these circumstances the rule will be made absolute for a new trial with costs, the direction of the Court being that the sale vested no property in the defendant. Notwithstanding the sale the property remained in the plaintiff, and he was therefore wrongly nonsuited.

Rule absolute accordingly.

9 MAY, 1878.

LEVI v. WHEAL JAMES MINING COMPANY.

COMPANIES ACT, 1864.—*Contributing Liquidation Calls—Transfer —Laches.*

About six weeks before a Company went into liquidation L. transferred certain shares to H., and duly lodged the transfer with the Secretary. The Directors wrongfully neglected to register the transfer, but no intimation of such non-registration was given to L. until after the Company was in liquidation, when the liquidator gave him notice of intention to place his name on the list of contributories. L. wrote in reply to the liquidator reminding him that he had transferred his shares, and heard nothing more of the matter until nearly two years after, when he was sued for certain calls made by the liquidator. On application by L. to have his name removed from the register and list of contributories,

Held—*That he had not been guilty of any* laches *to debar him of his right to have his name so removed.*

APPLICATION on behalf of Mr. Levi to remove his name from the list of contributories of the Wheal James Mining Company, on the ground that before the winding up Mr. Levi had transferred his shares to one Hubert.

The facts were as stated in the head-note.

J. W. Downer, for the applicant.—The articles of this Company gave no discretion to the Directors to refuse or accept the transfers, and the fact of the transferee being impecunious did not justify them in refusing the transfer; nor from the affidavits does it appear that they did so refuse—all they did was simply not to register the transfer, but no notice either of neglect or refusal was given to the transferor. Mr. Levi, hearing nothing to the contrary, naturally supposed the transfer had been registered. After the winding up, the liquidator, who was the Secretary of the Company, placed the applicant on the list of contributories; and he, in reply to his notice to show cause why they should not be so placed, reminded him of the transfer lodged.

Fyfe's Case, 4 Ch., 768

is exactly in point. There the transfer was lodged five weeks before the winding up, and the application to remove was not made till two years afterwards.

Wigley, for the Company.—It was the duty of the transferor to see that his shares were transferred, and he has been guilty of great *laches*. He had the means of knowing that the Directors refused to register the transfer before the winding up, and should then have made an application to the Court. The cases are quite clear that shareholders must in these cases be diligent, and delay much less than in this case had been held enough to disentitle transferors to have their transfers registered. Here nothing was done for more than two years, and it was only when Mr. Levi was sued that he came to this Court for relief. The Directors had no right to have refused the transfer, but the applicant's *laches* have barred his remedy.

Downer, in reply.—Fyfe's case and the cases in Lindley on Partnership (3rd. ed. 1443) show that until notice that the Directors refuse a transfer the transferor is justified in considering his transfer to have been registered, and that disposes of the delay before winding up. As to delay after the winding up that could not bar the remedy. *Laches* must be accompanied with damage to the other party to interfere with legal rights. In a going concern the leaving one's name on the register gave an appearance of credit to the Company, and so deceived creditors ; not so after the winding up, for then the Company does not trade, and no one gives it credit on the faith of the names on the register. On this point, too, Fyfe's case is conclusive.

WAY, C.J.—This case is singularly on all fours with Fyfe's, and I shall therefore make the order asked for.

Order made.

9 MAY, 1878.

ROWE v. THOMAS.

QUO WARRANTO.—Void elections— Public office — Resignation— Costs.

A person improperly declared elected, through the mistake of the Returning Office, is not liable for costs of a rule calling upon him to show by what right he holds office, when he has resigned his seat on the rule nisi being served on him.

RULE *nisi* calling upon one Thomas to show by what authority he held a certain public office.

It appeared that Thomas had, through default of the Returning Officer, been improperly declared elected.

On the rule being served on him Thomas resigned the office.

Ingleby, Q.C., appeared for the relator.

Symon, before motion was made, informed the Court that the defendant had resigned his office immediately on the service of the rule, and it would not therefore be necessary to move that the rule be made absolute.

Ingleby, Q.C.—I shall object unless he gets costs.

Symon cited—

Regina v. *Newcombe*, 15 W.R., 108.

WAY, C.J.—Abstract justice would seem to require that the Returning Officer should pay the costs.

Symon.—My client could not do otherwise than he did. He was elected, and *nolens volens* he had to take oath and his seat under a very heavy penalty.

Ingleby, Q.C.—It was necessary for the ends of justice that there should be some means of correcting abuses of this kind.

Under the Act a rule for *quo warranto* must be obtained within three calendar months of the date of election, and the person elected fills the office until that time. The Returning Officer is not before the Court, nor in any manner represented.

WAY, C.J.—What I have immediately to consider is whether Thomas should be mulcted in costs, and upon that I think the case cited by *Mr. Symon* is absolutely conclusive.

Rule absolute without costs.

14 MAY, 1878.

BRADLEY v. FORD.

ACT 25 OF 1852, SECTION 11.—Intestate—Widow—Dower.

The widow of an intestate is not deprived of her right to dower, by section 11, of Act No. 25 of 1852.

HEARING and further consideration.

The question to be decided was whether the defendant, Elizabeth Ford, widow, was entitled to dower since the death of her husband intestate notwithstanding Section 11 of Act No. 25 of 1852.

Wigley, for the plaintiff, submitted the widow was not so entitled

Smith's Real and Personal Property, 4th ed., 194.

Symon, for the defendant.—Act 25 of 1852 did not abolish the right to dower. The Imperial Act 3 and 4 William IV., cap. 105, instead of limiting, extended the right to dower, and the only effect of clause 11 was to remove any doubt as to the applicability of that Act to this colony and to extend its operation to women married before January 1, 1834, as well as afterwards. The proviso at the end was to protect women married before 1834 from the effects of a declaration barring dower introduced into conveyances, which were only intended to deprive women of dower who had been married after that date. The conveyance of real estate in this suit contained no declaration barring dower. As to the procedure to be adopted—

Jones v. *Jones*, 4 K. & J., 361.
Dicken v. *Hamer*, 1 Drew & Sm., 284.

According to the latter, further enquiry would have to be directed before the Master could find out what dower the widow was entitled to up to date.

HIS HONOR declared finally that the defendant, Elizabeth Ford, was entitled to dower out of the freehold estate, subject to the mortgage, reference to be made back to the Master to find what was due to her since the death of intestate up to the date of enquiry; further consideration of the case to be adjourned.

Declaration accordingly.

WAY, C.J.] [EQUITY.

14 MAY, 1878.

IN THE MATTER OF THE WILL OF PATRICK WETHERS, DECEASED.

WILL. - Trustees—"Refuse to act"—Commission—Jurisdiction.

A will contained a power of appointment of new trustees in place of trustees who should "refuse to act."

Held—*That this power might be exercised in the case of trustees refusing to act after having accepted the trust.*

The Court has no jurisdiction, on petition under the Trustee Act, to allow trustees commission.

PETITION of Wm. Edward Giles and John Garlick Pitcher, trustees under the will of Patrick Wethers, late of Mintaro, deceased, praying (1) that they might be discharged from their trusts, being unwilling to act further, and that Catherine Wethers and her two sons, John and Daniel Wethers, might be appointed trustees in their place; (2) that the new trustees might have the right to sue for and recover any chose in action subject to the trust, and that any interest in respect thereof might vest in them; and (3) that the petitioners might have such reasonable commission as the Court seemed meet.

The *Attorney-General (Mann, Q.C.)*, for the petitioners.—The words in the will "refuse to act," referring to the trustees, gave them power to decline to act after they had accepted the trust as well as before—

Travis v. *Illingworth*, W.N. (1868), 206
Re Armstrong's Settlement, 5 W.R., 448
Lewin on Trusts (6th ed.), 541.

HIS HONOR made an order in terms of the first and second prayer of the petition; but refused the third, as he had no jurisdiction in Equity to deal with it.

Order accordingly.

WAY, C.J., STOW, J.] [COMMON LAW.

30 MAY, 1878.

LEVI AND ANOTHER v. ROBIN AND ANOTHER.

BREACH OF CONTRACT.—Vendor—Purchaser.

The defendants purchased from the plaintiffs 207 *standard of deals ex "Star of Peace" to be delivered at the wharf at Port Adelaide within twenty-one days after notice of the ship's arrival.*

The defendants refused to take delivery pursuant to the contract, on the ground that the timber was not, as specified in the contract, 'in good order and merchantable condition."

According to the defendants' own evidence there were more than the quantity of deals landed from the vessel in the required order and condition necessary to satisfy their contract.

Held—*That the defendants were bound to select the deals which satisfied their contract, and were not justified in resisting because portion of the cargo was defective.*

RULE to set aside the verdict and to have a new trial, on the ground that the verdict was against the weight of evidence.

The action was to recover £1,000 damages for non-acceptance by the defendants of 207 standards of deal, being one-half of the cargo of the "Star of Peace" then loading in the Baltic.

The contract was contained in bought and sold notes, the deals being described as in good order and merchantable condition.

On arrival of the vessel the plaintiffs gave due notice to the defendants, who, having inspected the deals, refused to accept same on the ground, amongst others, that the deals were tainted with dry rot.

It appeared from the evidence that some portion of the deals was so tainted, but that there were more than enough sound deals to satisfy the contract, though not sufficient to satisfy the contract of the defendants, and a similar contract of the plaintiffs with one Charles Farr.

At the trial a verdict was found for the defendants.

Downer, Q.C., and *Symon*, having obtained a rule for a new trial, now moved that the same be made absolute.

Bundey, Q.C., and *Sheridan*, showed cause, citing—

Jones and Another v. *Just*, 3 L.R., Q.B., 197
Mellin v. *Taylor*, 3 Bing, N.C., 109
Swain v. *Hall*, 3 Wils., 45
Ashley v. *Ashley*, 2 Str., 1142
Anon 1 Wils., 22.

Downer, Q.C., and *Symon* were not called on in reply.

Per Curiam.—There were sufficient sound deals to satisfy the contract, and the defendants were therefore not justified in rescinding.

There must be a rule absolute for a new trial; the costs of the late trial to abide the issue of the new trial.

Rule absolute accordingly.

WAY, C.J., STOW, J.] [COMMON LAW.

4 JUNE, 1878.

GOSSE v. FORMBY.

PUBLIC HEALTH ACT, 1876.—*Nuisance — Order — Evidence — Offence—Board of Health Tribunal.*

Under Section 6 of the Public Health Act, 1876, *it is an offence to disobey an order of the Central Board of Health, and the Court, on the hearing of an information under that section, has not to enquire whether a nuisance does in fact exist, the Board of Health being the tribunal to decide that question.*

Quære—*Whether the Board of Health, before making an order under the above section, should not give persons affected thereby an opportunity of being heard.*

SPECIAL case from the Local Court of Adelaide.

The Central Board of Health served a notice upon the appellant, in which they alleged that a nuisance existed on the land and premises occupied by him at Woodville, and ordered him to abate the same within three days from the date of service of such notice, or legal proceedings would be taken against him. He disputed the existence of any nuisance, and for disobeying the order of the Board he was summoned to answer an information before the Special Magistrate at Port Adelaide. On the hearing he denied the existence of the nuisance, and called evidence in support of his contention that there was nothing to which the notice of the Board could apply; but the Magistrate ruled that he could not decide whether or not any nuisance existed, and could only enquire as to whether or not the order had been complied with. The defendant was therefore convicted. He then appealed to the Local Court at Adelaide, which held that disobedience of an order under the Public Health Act was in itself an offence, and the conviction was accordingly confirmed, subject, however, to the opinion of the Supreme Court as to whether such disobedience was an offence under the 6th section of the Act "without any evidence of the existence of the nuisance."

Symon, for the appellant.—The contention of the Board is that it is only necessary for them to give notice of a nuisance, and, without giving the person upon whom such notice has been served an opportunity of being heard as to whether or not the nuisance exists, if he disobey the order to abate he may be proceeded against and fined. No man is subject to a penalty either in his person or in his property unless he be given an opportunity of being heard in defence. (STOW, J.—Of course a principle alone cannot override express words to the contrary in an Act of Parliament.) But the Board are bound to do one of three things. Either they must give the defendant an opportunity of being heard before making the order to abate, which is the initiation of these proceedings—(STOW, J.—That is not the point raised by the case here, and we can only go by the case.) But I submit that the point is open to me on the case, because first I say the defendant ought to have an opportunity of being heard before the Board makes the order, and if he is not allowed that opportunity then the order itself is illegal and a nullity. (WAY, C.J.—Suppose there had been an investigation here, and the defendant had been given a hearing, and the Board had found that the nuisance did exist, all that investigation would, according to your argument, have to be gone over again when the matter came before the Magistrate.) The case shows that the initiation of the proceedings dated from the making of the order, without any preliminary enquiry at which the defendant was present. (STOW, J.—There is the order, and there is no evidence to show whether there was a hearing before the Board or not. The presumption is that they were right. Judicially we don't know whether or not there was an enquiry.) It is monstrous that there should be no redress against an order of the Board made in this manner. (WAY, C.J.—Yes; but that is not the question reserved for our decision. What do you say as to the point stated in the case?) Section 6 does not say that the Board are to be the absolute judges of the existence of a nuisance, but only if they consider it is right to make an order they are competent to make it, thus leaving the question of nuisance or no nuisance to be decided when the information for disobedience comes on for hearing.

STOW, J.—It certainly gives them very strong power. Without

expressing an opinion as to whether the Board should give persons an opportunity of being heard against any order we can only answer the point reserved to us in the affirmative.

Answer in the affirmative accordingly, with costs.

WAY, C.J., STOW, J.] [COMMON LAW.

4 JUNE, 1878.

CASSANO v. TEASDEL.

MERCHANT SHIPPING ACT.—Wages—Special case—Appeal—Jurisdiction.

The decision of Justices on the hearing of informations for seamen's wages is final; and they have no power to state, nor has the Supreme Court any jurisdiction to consider, a case reserved by such Justices for opinion, even though at the hearing such case be stated by consent of counsel on both sides.

Semble—*That under Sec.* 187 *of the above Act a seaman can within five days of his discharge or three days from delivery of cargo recover one-fourth of the wages due to him, and no more.*

CASE stated by the Special Magistrate of the Port Adelaide Local Court.

An information was laid by a seaman the day after his discharge and before delivery of cargo, to recover wages due to him.

The Magistrate made an order for payment subject to the opinion of the Supreme Court as to whether under the circumstances the informant was entitled to recover notwithstanding. Sec. 187 of the Merchant Shipping Act.

Symon, for the appellant, cited

Oke's Formulist (3rd ed.), 852,

(STOW, J.—It would appear that the claimant is not entitled to proceed for the whole of his wages until after the expiration of the period fixed by the Act, but he would, I think, be entitled to one-fourth; and if the Court concur in that view, the case should be sent back with that intimation.) That is not exactly the point. The contention is whether the plaintiff was entitled to sue instantly on his discharge for the whole of his wages. The point raised on

the construction of this section is what we ask your decision upon, because the Court below appears to be under some misapprehension as to its effect. It is of great practical importance as affecting the position of shipmasters and seamen. The plaintiff did not in the Court below rest his case on whether he was entitled to one-fourth at the time of his discharge, but on his right of immediate recovery of the whole of his wages. (STOW, J.—But I do not think there is any appeal given by law from the Act.) In this instance, however, the case is stated by consent.

STOW, J.—Is that so, *Mr. Smith*?

Smith, for the respondent.—Yes; but Mr. Dempster, who appeared before the Magistrate for the defendant, submitted that His Worship was going outside his jurisdiction by dealing with the case at all.

WAY, C.J.—But you got a judgment. Counsel consenting on both sides cannot give us jurisdiction.

Symon.—Upon looking at the Act, I confess there is no appeal; but Section 188, which provides the mode of recovery, states that it shall be in a summary manner, and our Language of Acts Act states that where money is recovered in that way it shall be under Act 6 of 1850.

STOW, J.—Act 6 of 1850 merely regulates the procedure where an appeal exists; it can have no other bearing.

Symon.—Section 188 refers to the Justices of the Peace acting in or near to the place where the service terminates. Now, I contend that the acting in or near to the place can only be under Act 6 of 1850.

STOW, J.—The Justices, having power to act in a summary manner, may perform the functions given them under that Act, but their powers are limited by it.

WAY, C.J.—I am satisfied that the intention of the Imperial Act is that wages may be sued for before Justices, and that their order is final.

STOW, J.—All we can say is that we have no jurisdiction.

Case returned accordingly.

WAY, C. J., STOW, J.] [COMMON LAW.

4 JUNE, 1878.

CULLEN v. DEMOLE (Nominal defendant).

TRIAL BY PROVISO.—Supreme Court Procedure Act.

Where after issue joined the plaintiff neglects to proceed to trial, the defendant may give notice of trial by proviso instead of giving the twenty days' notice provided by sec. 95 of the Supreme Court Procedure Act.

MOTION by defendant for liberty to deliver notice of trial by proviso, and set down the cause for trial at the ensuing Civil Sittings of the Supreme Court.

The petition was presented in pursuance of Ordinance No. 6 of 1853, and referred to the Supreme Court. Issue was joined on November 1, 1876, and on June 25, 1877, the Court made an order by consent for the trial of the cause at the then ensuing Civil Sittings on July 10. It was accordingly set down for trial on that date, but afterwards plaintiff withdrew the record, and he had not since taken any step for bringing the cause on for trial. On March 23, 1878, he left the province for Europe, and had thereby placed himself beyond the jurisdiction of the Court.

Ingleby, Q.C., for the defendant, now moved as above stated.

Wigley, for the plaintiff.—In accordance with clause 1 of the Act 6 of 1853 the Court made an order for trial, but no trial has taken place; and by clause 4 the Court has only power to order on "an appeal, or rehearing, or motion for a reversal of verdict, or otherwise as in ordinary cases of Law or Equity." The Court has no power to order a trial by proviso for the defendant, because the Act sets out what power the Judges have, and there it stops. Further, clause 101 of the Imperial Act, which corresponds with clause 95 of our Act, states that when issue is joined in any cause and the plaintiff has neglected to bring such issue on for trial the defendant may give twenty days' notice to the plaintiff of his intention to bring it on for trial at the sittings

ensuing after the expiration of such notice, and if plaintiff neglects to appear the defendant may sign judgment for his costs. I submit he ought to have given that notice.

Day's C. L. Procedure (4th ed.), 127-8.

STOW, J.—That only provides that after a certain notice has been given and the plaintiff neglects it the defendant may have judgment as in a nonsuit, but it says nothing which alters the right of procedure by proviso. The plaintiff has the option either to give twenty days' notice according to the 95th clause or to at once carry it down by proviso. But by your contention the Court has no power to make an order, simply because you have done nothing.

WAY, C.J., concurred.

Order, that the defendant have liberty to give to the plaintiff eight days' notice of trial at the next Civil Sittings, and to lodge a record of the proceedings for that purpose.

27 MAY AND 10 JUNE, 1878.

STEVENSON v. BANBURY.

MALICIOUS PROSECUTION.—Reasonable and probable cause.

The plaintiff and defendant were owners of property abutting on a private street called Ann Street. The plaintiff memorialized the Corporation to take and make the street, and on the 1st October, 1877, *obtained from the defendant his cheque for* £6 15*s.*, *crossed "Pay Adelaide Corporation only." The plaintiff paid the Corporation his own cheque for an amount which included the* £6 15*s.*, *and afterwards, on the 13th October,* 1877, *made use of the defendant's cheque for another purpose.*

The money paid by the plaintiff to the Corporation was returned to him some ten or eleven days afterwards, with an intimation that the street in question was being formed under the provisions of the Public Health Act, and that the cost to the defendant would amount to £8 13*s.* 3*d.*

The plaintiff did not return to the defendant the amount of his cheque, or pay defendant's proportion of the cost of making Ann Street.

On the 24th November, 1877, *the defendant, having discovered that his cheque had been used by the plaintiff, wrote to the latter threatening him with criminal proceedings.*

Receiving no reply, the defendant consulted his solicitors, who themselves made enquiries, but there was only general evidence as to what these enquiries were or what statement the defendant laid before them. Nor was there any evidence whether the defendant knew or enquired whether his cheque had been used by the plaintiff while the plaintiff's own cheque was in the hands of the Corporation.

Acting under the advice of his solicitors, the defendant laid a criminal information against the defendant on the 29th November, 1877, *which information was, on the 3rd December, dismissed by the Police Magistrate.*

A verdict having been found for the plaintiff,

Held—*That there must be a new trial to obtain further evidence as to the statements laid before counsel by the defendant prior to laying the information, and also as to whether the defendant knew or enquired whether the plaintiff's cheque was in the hands of the Corporation when he paid away the cheque of the defendant.*

RULE for a new trial on the ground that the verdict was against the evidence, and the weight of evidence.

The action was for malicious prosecution, and was tried on the 9th April before the Chief Justice and a jury, when a verdict was found for the plaintiff for £50 damages.

The facts were as follow :—

The plaintiff and the defendant owned land in a certain town acre in North Adelaide, intersected by a private street called Ann Street. Plaintiff exerted himself to get the street taken over by the Corporation and properly made, on the usual terms, viz., that £30, or one-half the cost, be borne by the property-owners and the other half by the Corporation. The defendant signed the memorial and gave to plaintiff his (defendant's) cheque for £6 15s. as his proportion of the expense, writing on the face of the cheque before handing it over—"Pay Adelaide Corporation only." This was on the 1st October, 1877. Before presenting the memorial to the Council it was necessary to pay the subscription-money, amounting to £30, to the City Treasurer, and the plaintiff acted accordingly; but instead of paying in the various sums as he had collected them, including the defendant's cheque, which he had just received, gave his (plaintiff's) own cheque for the whole amount of £30, which cheque the Treasurer accepted. The memorial, was afterwards on the same day considered by the Council, but in consequence of an informality it was rejected, and five or six days later the plaintiff was informed by the City Treasurer, that he thought it would be necessary to return him the £30, which, four or five days later still, was done. Meanwhile the plaintiff had used the defendant's cheque to pay for a similar contribution in respect of another street called Marion Street, where he also had property, his contribution for which by a coincidence amounted to exactly the value of the defendant's cheque. In Marion Street the defendant had no interest whatever. Then for the first time, on the 13th October, the defendant's cheque was passed into the City Treasury together with other moneys for the making of Marion Street. Ann Street was meanwhile being made

under the compulsory clause of the Public Health Act, whereby the cost to the owners was increased, the defendant's portion being £8 13s. 3d., instead of £6 15s., as it would have been under the voluntary system of dedication to the Corporation. Plaintiff did not pay the defendant's proportion of the cost, notwithstanding that he had received and used the defendant's cheque as stated; but after proceedings were taken against him he tendered the money to the City Treasurer. On November 24 the defendant wrote to and the plaintiff received the following letter:—"Adelaide, November 24, 1877. Sir—I find in my bankbook a cheque for £6 15s. paid to you as part of the subscription for making Ann Street, and specially endorsed to the Corporation. Upon making enquiry of the City Treasurer how this was he tells me the cheque was returned to you and was repaid him for the making of Marion Street, with which I have nothing to do whatever, and that it bears your endorsement. Ann Street is not made, and my cheque is improperly made use of, and for which I have never received the slightest consideration or return. It will be my duty at once to apply to Mr. Beddome for a warrant for it having been so used. —Yours obediently, C. BANBURY." Plaintiff made no reply to this communication, and on Thursday, November 29, the defendant, acting under the advice of his solicitors, laid a criminal information against him. On Monday, the 3rd, the information was heard by the Police Magistrate and dismissed.

Ingleby, Q.C., and *Downer, Q.C.*, now moved that the rule be made absolute.

Smith and *Matthews* showed cause.—The case of

Johnson v. *Emerson*, L.R., 6 Ex., 329,

upon which the motion for the rule was mainly granted, so far from being an authority for the defendant, is against him. (WAY, C.J.—But *Mr. Ingleby* pointed out that there was a concession made even by the dissentient Judges, which in effect conceded *Mr. Ingleby's* argument.) Neither of the Judges seems to have trespassed upon the old doctrine that a client is answerable, though he has acted upon bad advice. In

Ravenga v. *Mackintosh*, 2 B. & C., 693,

which does not touch the older case of

Hewlett v. *Cruchley*, 5 Taun., 277,

Mr. Justice BAYLEY, alluding to the effect of counsel's opinion in giving "reasonable and probable cause," even when such opinion is erroneous, only says *obiter dictum*, for the Judge went on another point—"I accede to the proposition that acting *bona fide* on counsel's opinion would free the defendant from liability, supposing all the facts fairly laid before counsel." Now, so far as the jury could judge, the opinion of counsel—which, by the way, was not disclosed, it was carefully hidden on the trial—was not followed. But, assuming that it was, we submit that all that may arise from an ignorant man may also arise from a man of the highest intellect, if he is misled by an angry or a malicious client, as the defendant was here. Apart, however, from that question, the cheque was as negotiable as a bank-note—

Carlon and Another v. *Ireland*, 25 L.J., Q.B., 113
Bellamy v. *Marjoribanks*, 21 L.J., Ex., 70.

If the defendant *bona fide* thought that by crossing his cheque he made it negotiable only to the Corporation, and that any intermediate holder would not have the right to use it except by giving it to the Corporation, he was making one of those blunders which Baron BRAMWELL says "the party making it should pay for'—

Huntly v. *Simson*, 27 L.J., Ex. 134
Addison on Torts (4th ed.), 616.

But the evidence proved that long before he sought advice he was in a hostile mood towards the plaintiff. First of all, he showed the greatest unwillingness to assist the plaintiff in getting the street made, and only yielded at last when pressure was brought to bear on him; and subsequently he passed the plaintiff by in the street without noticing him. Then following up this line of conduct, when he knew what the plaintiff had done with the

cheque—notwithstanding that he had known him for several years to be a respectable citizen, and carrying on a large business in Adelaide—he wrote and sent him a letter, three days before he sought counsel's advice, in which he threatened to "take out a warrant before Mr. Beddome." Surely malice may be inferred from all this. Mr. Justice HOLROYD, who is mentioned in

Johnson v. *Emerson* (*ubi supra*)

as being a most accurate Judge, expressly says that he refrains from pronouncing an opinion as to what effect taking of wrong advice from counsel ought to have; and Baron CLEASBY says that these matters "must be left to the careful conclusion of men of the world, with good sense and feeling, rather than be made the subject of strict argument and reasoning." (STOW, J.—I have often had occasion to consider questions of this kind, and have searched through all the authorities, and I do not think that dictum of BAYLEY has ever been followed.)

Johnson v. *Emerson*, at p. 353.

The whole Court agreed with Mr. HOLROYD. The dissent was on another point altogether. (WAY, C.J. — But the case as put by the other side is whether Mr. Banbury might not have believed from all the circumstances which were within his knowledge at the time that an offence had been committed. I put it to the jury that it was a mistake to suppose that any offence had been committed, and therefore there was no "reasonable or probable cause," but that it was for them to consider what motive prompted Mr. Banbury throughout the proceedings, for they had a right to find malice when there was a want of "reasonable or probable cause." (STOW, J.—And my learned colleague pointed out that going to counsel for advice and acting upon it formed no evidence of "reasonable or probable cause.")

Dubois v. *Keates*, 11 Ad. & E., 329.

(STOW, J.—The point turns altogether upon whether the learned Chief Justice was right in saying there was no "reasonable or

probable cause;" whether if a man acting upon the advice of his counsel, before whom he has laid all the facts of the case, and believing in that advice, has "reasonable or probable cause." That is how the Chief Justice put it on the question of malice.)

Ingleby, Q.C., in support of the rule.—The only pertinent case in the books is that of

Johnson v. *Emerson* (*ubi supra*).

As to the other two—

Ravenga v. *Mackintosh* (*ubi supra*)

and

Hewlett v. *Crutchley* (*ubi supra*),

the one was a dispute not on any point of law, but on the facts, and the other went on an incorrect apprehension of the facts or a want of correctly ascertaining the facts. (As to the former case, *vide* marginal note of Baron BRAMWELL'S judgment.) There is no authority whatever which shows that the mere fact of there being a mistake on a point of law—that that alone, *simpliciter*, is a sufficient ground for presuming there was no reasonable or probable cause; and I submit that if the defendant here acted *bona fide* on the opinion of his counsel he had reasonable or probable cause. (STOW, J.—Your contention is that his only error in point of law was in following out the direction of his counsel.) Yes—

Heslop v. *Chapman*, 23 L.J., Q.B., 49.

The elements of the case are these:—1st—Was my opinion incorrect; and 2nd, did Mr. Banbury believe it was incorrect, or did he believe in it *bona fide*? The case quoted by His Honor the Chief Justice,

Lister v. *Perryman*, L.R., 4 E. & I., Ap., 522,

was an extraordinary case, but it was decided on the facts and

really involved no principle of law. If ever there was a case in which malice was absolutely wanting this was it. (STOW, J.—May not the jury presume malice from the absence of reasonable or probable cause, and on nothing else? I have heard it so laid down in this Court over and over again. Mr. Justice GWYNNE, for example, has distinctly said so.)

Purcell v. *McNamara*, 9 East, 363.

The bare fact of acquittal was not evidence of malice, although malice might be gathered from the mode in which the prosecution had been conducted. (STOW, J.—The effect of that case is really this—if you show the want of reasonable or probable cause it may be taken as evidence of malice.) My friend's argument in regard to malice is, first, that the facts were not correctly laid before the counsel. (WAY, C.J.—My impression of the case is that the facts were fairly laid before the counsel.) And not only were they fairly laid before him, but both myself and *Mr. Robinson* investigated them, and independently arrived at the same conclusion. The question is whether or not the defendant had reason to believe that the writing he made on the face of the cheque was a direction to the plaintiff or not. It is curious that if that direction had been on a separate piece of paper it would have been clearly a direction to the plaintiff, and I would have been right in my advice.

Downer, Q.C., on the same side.—The two questions are these:—First, whether the plaintiff's case showed want of reasonable or probable cause, and, if so, whether the defendant's case supplied the deficiency, and established reasonable or probable cause; and secondly, whether or not the verdict of the jury is against the weight of evidence. The undisputed facts are, that plaintiff got a cheque from the defendant for a specific purpose, crossed payable to the City Corporation. Defendant was a member of the City Council, and attended at the Council meeting when the question affecting that purpose was discussed. The proposal was rejected by the Council on a preliminary point, and the defendant took it as a matter of course, that either the Corporation would retain the

cheque, or that the plaintiff would return it to him. The next thing he knew about it, according to his evidence, was when he got his Bank-book made up, when he discovered that the cheque had been paid. He asked defendant what he had done with the money, and the defendant had informed him that he had paid it away. Plaintiff then went to the Treasurer of the Corporation, and found that the cheque had been paid in by another person and for another purpose. What could he think but that his money had been misappropriated by the plaintiff? What other construction could he put on such conduct? Was there anything unreasonable in his writing to the plaintiff, and saying he would institute a criminal prosecution against him? Having written to that effect, he waited some days to see if the plaintiff would reply, and then when he got no answer he went to an eminent Queen's Counsel, to his own lawyer, and asked his opinion; and that there should be no mistake about it he told his lawyer not to act merely on his (the defendant's) own statement of the facts, but to investigate them for himself, which his counsel did by making enquiry of the Town Clerk and City Treasurer. His counsel then gave his opinion that it was an undoubted offence, and that the plaintiff was liable for a criminal act. The defendant thereupon took a day or so to consider, after which he instituted proceedings against the plaintiff. Now, on these facts, had he reasonable or probable case for the prosecution? And did he institute that prosecution maliciously? Reasonable or probable cause is a changeable quantity. What would be reasonable or probable cause for one person might not be reasonable or probable for another. As defined in the cases, reasonable cause is what a discreet man would do, probable cause what a reasonable man would do. As a discreet man the defendant went to his lawyer and asked him not merely to take his own account, but to ascertain the facts for himself, and then, after obtaining his opinion in this manner, he took time to consider it before he acted. BAYLEY, J., said in

Ravenga v. *Mackintosh* (*ubi supra*)

that circumstances like these would be reasonable or probable cause.

Hewlett v. *Crutchley* (*ubi supra*)

is relied on by the other side as establishing a contrary proposition; but in that case MANSFIELD, C.J., decided on the ground that the facts had not been correctly laid before the counsel; CHAMBERS, J., decided on the same ground; and HEATH J., said *obiter* that it would be a dangerous thing if a man could shelter himself under the advice of a weak or foolish counsel. Then in

Johnson v. *Emerson* (*ubi supra*),

all the Judges agreed that error in point of law would not support an action for malicious prosecution, and that there was there evidence of express malice. What they disagreed upon was, whether the circumstances in that case established reasonable or probable cause. I submit that, apart from authority, the Court would require authority to the contrary before it could say that a man who has taken all the means that a reasonable and discreet man would take to satisfy himself as to his legal position should be liable for malicious prosecution, by reason of his having come ultimately to a wrong conclusion as to that position. Whether or not he honestly acted on his lawyer's opinion would be a question for the jury to decide. I submit—1st, that the contention of my learned friend *Mr. Ingleby* is a reasonable contention, and that so far as the authorities go they really carry out his contention; and 2nd, that even supposing there were no reasonable or probable cause there is no evidence of malice. The absence of reasonable or probable cause would not necessarily constitute evidence of malice. The text-books state the law to be so, and I have always understood it to be so; but an examination of the cases cited in the text-books by no means supports the conclusions to which the writers have arrived. The principal case cited for the proposition is

Busts v. *Gibbons*, 30 L.J., Ex. 75,

but then the question of malice did not arise in any shape or form. There was evidence of direct malice that the defendant threatened he would do all he could to transport the plaintiff, and so the question of malice did not transpire. Nor is there one word made

in reference to that portion of the case in the judgment. The other case cited from 9 East says what I imagine any reasonable man would say—"that the want of reasonable or probable cause may be so strong and plain that it may amount to malice." That I should think must be transparent to anybody; but each case must proceed on its own merits. The want of reasonable or probable cause is not necessarily evidence of malice. (WAY, C.J.—You mean not conclusive evidence of malice.) (STOW, J.—But is it not necessary evidence to go to the jury?) It may or may not be evidence of malice. It is for the determination of the Judge whether or not there is any evidence to go to the jury. (STOW, J.—There being no reasonable or probable cause that it is for the Judge to say whether there is evidence of malice? That would be upsetting the decisions of this Court and of every other Court.) I know all the text-books do assume it to be law that absence of reasonable or probable cause is in itself evidence of malice; but the cases on which the text-writers rely by no means support the conclusions arrived at by those writers. But it is not necessary in this case that the Court should decide the fine question of whether or not the absence of reasonable or probable cause would justify the jury in finding malice; for that presumption of malice must be like every other presumption, subject to refutation. That there is any evidence of malice apart from reasonable or probable cause the other side do not contend. It would be childish to say that merely because a man is unwilling to part with his money he must necessarily have malicious feelings towards the person who asked him for it.

Smith, in reply, cited

Fitzjohn v. *Mackinder*, 30 L.J., C.P., 257.

Cur. ad. vult.

10 June—

WAY, C.J., now delivered judgment as follows:—This is a rule to set aside the verdict for the plaintiff and to enter a nonsuit, or for a new trial, on the ground that I improperly directed the jury that there was no reasonable and probable cause for the prosecu-

tion in respect of which the action was brought, and that the verdict was against the weight of evidence. There is no rule of law better established than that upon the trial of an action for malicious prosecution "reasonable and probable cause" is a question of law for the decision of the Judge; and it is equally clear that the facts upon which that question has to be answered have (if there be any in dispute) to be determined by the jury. Now, although it appeared to me at the trial that there were really no questions of fact in dispute in this branch of the case, I am satisfied that if I had asked the counsel for the parties if they were agreed that the defendants had or had not at the time of laying the information an honest belief in the commission by the plaintiff of the crime with which he was charged, I should have found that there really was a difference in this preliminary question of fact to be submitted to the jury. And on the larger question, as to whether or not the circumstances were such as would have induced a reasonable person with a fair and unprejudiced mind to act upon them as the defendant acted, we are both of opinion that before it can be satisfactorily answered a further investigation of the facts is required. It was shown that the defendant's solicitors advised the prosecution; but there is only general evidence of the statement which was laid before them. The nature of the enquiries which were made was not given in any detail; and there is no evidence whatever on one very important point, namely, whether the defendant knew or asked before laying the information if his cheque had been paid away by the plaintiff whilst his own was in the hands of the Corporation Treasurer. The facts necessary to enable us to determine the existence or want of reasonable and probable cause having neither been found by the jury nor admitted by the parties we express no opinion as to the second branch of the rule, which will be made absolute for a new trial.

STOW, J., concurred.

Rule absolute for a new trial.

WAY, C.J., STOW, J.] [COMMON LAW.

24 JUNE, 1878.

HODGKISS v. FEATHERSTONE.

EQUITABLE PLEA.—Striking out—Demurrer.

To an action for breach of covenant in a conveyance of certain land the defendant pleaded, that, as regards the portion of the land in respect of which the alleged breach arose, the same had been included by mistake; that there never was any consideration for the conveyance of that allotment; and that the real agreement between the parties had been performed.

Held—*That the plaintiff was not entitled to have these pleas struck out, but that his proper course was to try their validity by demurrer.*

MOTION for a rule *nisi* calling on the defendant to show cause why an order dismissing a summons to strike out certain pleas should not be set aside or rescinded.

The plaintiff had conveyed to the defendant some allotments of land at Brighton, and in the conveyance was included Allotment 11, to which the defendant had no title.

On action for breach of covenant in respect of that allotment, the defendant pleaded as set out in the head-note.

The plaintiff took out a summons to strike out such pleas on the ground that the questions raised could not be decided by a Court of Law, which summons, on the 22nd June, 1878, was dismissed by the Chief Justice.

Ingleby, Q.C., and *Robinson*, now moved for a rule to set aside or rescind that order.—The answer set up by defendant is not a proper equitable plea. (WAY, C.J.—You complain that defendant has been allowed to plead that there was mistake as to a particular allotment.) The plea does not set out the whole of the facts. An equitable plea ought not to be allowed in this case, inasmuch as the instrument ought to be reformed; and secondly, the facts render it exceedingly difficult to frame a replication without a departure from the rules of pleading. (STOW, J.—Why can't you

demur? I think where a plea of this sort has been allowed you should demur.) (WAY, C.J.—That was my view when the matter came before me in Chambers. I thought on the whole that the plea ought to be allowed, and that it would be better to go on to demurrer.) In dealing with a replication to an equitable plea, you can put in all in an equitable replication that you can put in a bill in Chancery; and supposing in Chancery the defendant file a bill for the purpose of having reformation of a deed of conveyance, no Court of Equity would allow that deed to be rectified unless he offered to do equity—

Perez v. *Oleaga*, 25 L.J., Ex. 65
Gorely v. *Gorely*, 1 H. & N., 144
Wakly v. *Froggatt*, 33 L.J., Ex. 5
2 H. & C., 669.

Downer, Q.C., and *B. Moulden* for the defendant.

WAY, C.J.—In my opinion this question will be much better settled by demurrer. I don't think the rule should be granted.

STOW, J., concurred.

Motion dismissed.

WAY, C.J., STOW, J.] [COMMON LAW.

4 JULY, 1878.

REGINA v. FINDLEY.

CRIMINAL LAW CONSOLIDATION ACT, Sec. 397 and 398—Case Reserved—Discretion of Presiding Judge.

Under Section 397 of the Criminal Law Consolidation Act the reservation of any point for the consideration of the Full Court is purely discretionary.

W. V. Smith moved, under Section 397 Criminal Law Consolidation Act of 1876, for an order directing the Judge (Mr. Justice STOW) who tried Mary Ann Findley at the last Criminal Sittings, on a charge of receiving stolen property, to state a case arising thereout for the opinion of the Full Court. The necessary reading of the section showed that it not only left the reservation of any point to the discretion of the Judge, but provided for a review by the Full Court of the exercise of his discretion.

Per Curiam.—Reading the section with that following, viz., 398, it appears that the reservation of any point is purely discretionary, and except the Judge reserves it the matter cannot come under review by the Full Court.

Motion dismissed.

STOW, J., AND A JURY.] [CIVIL SITTINGS.

11 JULY, 1878.

SUDHOLZ v. BASEDOW AND ANOTHER.

COST PRICE.—Extraordinary Price.

The plaintiff sold defendants certain plant at "cost price."

Held—*That the defendant was bound to pay what the plant actually cost the plaintiff, even though the price paid by him was extraordinary.*

ACTION to recover £1,500, purchase-money of the *Neue Deutsche Zeitung* newspaper, and for type and materials sold by the plaintiff to the defendants. Defendants pleaded payment as to £566 13s. 2d., and claimed to set off £42 10s. for work and labour done. The contract was comprised in a letter (September 11, 1876) addressed by the defendants to the plaintiff, offering to purchase the *Neue Deutsche Zeitung* for £1,500, by paying cost price for plant and the remainder by collecting the book-debts of that paper and by paying 10s. per year for each subscriber to it until the £1,500 had been paid. The defence relied upon was that by the terms of the agreement the defendants had to pay what the type would cost under ordinary circumstances, and not what it had cost the plaintiff, who had paid extraordinary prices; and that as to the 10s. per year for each subscriber, it was to be made subject only to the defendants receiving the subscriptions, and that such subscribers only numbered 280 altogether.

The *Attorney-General (Mann, Q.C.)*, and *Symon*, for the plaintiff; *Downer, Q.C.*, and *Homburg* for the defendants.

STOW, J.—Cost price means what it has cost the plaintiff, and the defendants were liable to pay 10s. per year per subscriber on the number of subscribers as ascertained until the £1,500 had been wholly paid, without regard to the defendants receiving such subscriptions or not.

WAY, C.J., STOW, J.] [COMMON LAW.

23 AND 30 JULY, 1878.

HARVEY v. BIRRELL.

TRESPASS.—Damages—Bailiff—Bona fides—Reduction.

Where a Bailiff, bona fide *and without violence, seized and sold under a warrant the goods of the wrong person, and the Jury, without proof of any special damage, awarded the plaintiff* £100 *over and above the value of the goods sold, the Court held the verdict excessive and reduced the amount by one-half.*

RULE *nisi* for new trial or reduction of damages.

The *Attorney-General (Mann, Q.C.)*, and *Ingleby, Q.C.*, having on the 23rd July obtained a rule *nisi* for a new trial or to reduce the damages, now moved that the same be made absolute.

The action was for trespass on premises, seizure and sale. Defendant was the bailiff of the Adelaide Local Court, and was entrusted with a warrant of execution against Thomas Harvey, son of the plaintiff, James Harvey, both of whom carried on business separately as limeburners in the same neighbourhood, and had business dealings with the execution creditors. Thomas Harvey's name was not written in full in the warrant; the Christian name was represented by an initial letter only, which the plaintiff read as T and the defendant as J; but, as the learned Judge pointed out on the trial, any doubt on the matter might have been solved by examining the other writing in the warrant, when it would be seen that in the word January the letter J was written quite differently. One of the defendant's assistants went to plaintiff's house with the warrant, but the plaintiff not being at home he left and returned on the following morning and saw him. Plaintiff denied all knowledge of the debt and produced his receipts, which so satisfied the man that he returned to the defendant and reported the matter as a mistake. But on the afternoon of the same day two other men in the defendant's service went to plaintiff's house with the warrant, and said that the last man had not done his duty and they were come to do it. They

did not care whether plaintiff owed the money or not; all they had to do was to put the execution into force. Accordingly they seized plaintiff's horse, dray, and a set of harness, despite plaintiff's protest; and in a day or two afterwards this property was sold by public auction, in pursuance of a notice which was advertised in the daily newspapers. Plaintiff owed several accounts at the time, and in consequence of this proceeding his creditors pressed him for payment. There was no suggestion of vindictiveness or violence. A verdict was given for £100 damages over and above the value of the goods seized.

Downer, Q.C., and *Mathews* showed cause. — The point will turn on the amount of the *solatium* only, and not on that part of the verdict which covers the value of the property in question. It is not a case in which the Court will interfere, because in the nature of things it is a matter incapable of any accurate estimation by the Court as to the precise amount of injury which might be done to a person in the plaintiff's position by an execution being put in his house. There was no violence used, nor was there anything vindictive in the defendant's conduct; but the question was not what was the nature of the defendant's conduct, but what effect his conduct had on the plaintiff and his position. The execution would be very painful to the feelings of any man, and would be very likely to injure him in the estimation of his neighbours and of those people with whom he had business dealings, and it was clear from the evidence that this execution was notorious—the fact of the goods being advertised and sold by auction would in itself create notoriety. No amount of *bona fides* on the part of an officer of the Court who made a mistake of this kind could disentitle the plaintiff to the damage he had actually sustained, and the question therefore is whether £100 is such an unreasonable amount—"so monstrous and enormous that all mankind shall be ready to exclaim against it at the very first blush—"

Beardmore v. *Carrington*, 2 Wils., 244.
Mayne on Damages (3rd ed.), 513.
Bruce v. *Rawlins*, 3 Wils., 61
Redshaw v. *Brook*, 2 Wils., 405.

(WAY, C.J.—All these cases are apparently cases in which there was no shadow of right—where there was an intentional invasion of right.)

Addison on Wrongs (4th ed.), 1002-3
Edgell v. *Francis*, 1 M. and G., 222
Creed v. *Fisher*, 9 Ex., 472—Pollock C.B.

(WAY, C.J.—Speaking argumentatively, it strikes me that the jury did go on a wrong principle, thinking that it was not so much their duty to compensate the plaintiff for the injury he had received as to punish the bailiff. Now, I do not think the bailiff ought to have been punished.) The jury were in a better position to assess the damages than gentlemen removed from a business sphere. Rather, however, than have a new trial, we will submit to such a reduction of the damages as your Honors may deem fair and reasonable.

Mann, Q.C., and *Ingleby* in reply cited—

Price v. *Severne*, 5 M. & P., 125.
Gough v. *Farr*, 1 Y. & J., 477.

WAY, C.J.—My impression is coincident with the opinion of my learned colleague, that the verdict was excessive, having regard to the circumstance that there had been no misconduct whatever on the part of the defendant, and that no actual injury to the plaintiff has been shown. The case came within the rule where a jury acts on a wrong principle and has made a gross error or is under misconception as to the amount of damages. We think the justice of the case will be met by reducing the verdict to one-half, viz., to £50, over and above the £50 in respect of the property which had been wrongly seized and sold.

Downer consented.

Rule absolute accordingly to reduce the verdict to £100. *No costs.*

WAY, C.J., STOW, J.] [COMMON LAW.

19 AUGUST, 1878.

RAMSAY v. RAMSAY AND SPARKS AND ANOTHER.

MATRIMONIAL CAUSES.—Practice—Motion to take petition off file.

An application to take a petition for dissolution of marriage off the file, on the ground that certain persons named therein as adulterers are not joined as co-respondents, is properly made to the Court, and not to a Judge in Chambers.

MOTION to take a petition for dissolution of marriage off the file on the ground that certain persons named in the eighth paragraph as adulterers were not joined as co-respondents, or to strike out such paragraph.

Ingleby, Q.C., for the respondent, moved.

Downer, Q.C., for the petitioner, said he consented to the paragraph being struck out, but objected to the matter being brought on motion before the Court when it might be done in Chambers. It was a question of costs.

Ingleby, Q.C., cited

Pritchard (3rd ed.), 216
Brown's Divorce Practice (3rd ed.), 204.

Downer, Q.C.—The rules of pleading are not the same here as laid down in Pritchard. This motion was in effect an application to amend the pleadings.

STOW, J., dissented.

Motion granted with costs.

28 MAY, 3, 6, 8, 24, AND 25 JUNE, AND 9 SEPTEMBER, 1878.

HAMBLIN v. MARJORAM.

SPECIFIC PERFORMANCE.—Part agreement—Part performance—Statute of Frauds—Signature by Agent—Initials.

The plaintiff verbally agreed with C., who purported to act as the defendant's agent, for the purchase of certain land, possession to be given on the 1st November, 1877. On the 1st September, 1877, the plaintiff, with defendant's permission, planted some seed on the land, the plaintiff admitting that at that time it was contemplated that the contract should be reduced into writing. On the 3rd September, C. wrote an agreement for sale in the words following:—"I have this day sold to Mr. Frederick Hamblin, who has this day bought from me, 5½ acres of land, part of Section 162B, as bounded in the plan in the margin of certificate of title, Register-book Vol. vii., folio 38, for the sum of £750, to be paid as follows:—£50 cash deposit, £200 on the 1st October next, and the balance of £500 to be secured by a mortgage of the property at 7 per cent. per annum from the 1st day of November next. Interest to be paid quarterly, and property to be insured in name of mortgagee. The said Frederick Hamblin to be entitled to possession on the 1st day of November next. As witness the hands of the parties hereto this 3rd day of September, 1877.—Frederick Hamblin.' This agreement was not signed by the defendant or by C., who, however, initialled certain alterations in it.

This document and the following letters were relied on as constituting a writing sufficient to satisfy the Statute of Frauds:—"King William Street, Adelaide, 21st August, 1877.—Mr. Marjoram.—Dear Sir—Will you take £700 for your property? If so, I think I can sell it. You must let me know this afternoon. You had better come up and see me at once.—Yours truly, RICHD. B. COX." *"King William Street, Adelaide, 3rd September, 1877.—Mr. Marjoram.—Dear Sir—Mr. Hamblin has signed the agreement, and will pay £100 on the 1st October (next month); the balance will be secured, £600, by mortgage, interest £7 per cent. for three years, interest payable quarterly from the 1st of November, the day when he takes possession. When you are in town, please call and sign the transfer. Mr. Hamblin will have to insure the house in your name as soon as he takes possession.—Yours truly,* RICHD. B. COX." *Mr. Hamblin wants you to get the lucerne sown, and he will pay for it." "Mr. Marjoram.—Dear Sir—Mr. Hamblin says he will pay £200 on the first of next month and sign a mortgage for £500 at £7 per cent. I think this will suit you very well, and you can't be better secured. I shall be down to see you on Sunday if all is well. Hoping you are both well, I remain, yours obediently,* RICHD. B. COX. *September*

6, 1877. *Don't forget the lucerne.*" "*King William Street, Adelaide, September* 4, 1877.—*Mrs. Hamblin, Kingston Terrace, Lower North Adelaide.—Dear Madam—Mr. Marjoram called on me this morning and states that he must be paid another* £100 *on the* 1*st October in addition to the other* £100, *making together* £200. *You had better see Mr. Hewer at once and arrange the matter with him, otherwise you will lose the property.—Yours truly,* RICHD. B. COX." "*September* 6, 1877.—*Received from Mr. F. Hamblin the sum of* £50 *on purchase of Mr. Marjoram's property at Reedbeds.* £50. RICHD. B. COX."

Held—*That the sowing of the seeds being at a time when a written agreement was intended to be entered into, and not being pursuant to any form of contract, was not a part performance. That there was no contract sufficient to satisfy the Statute of Frauds.*

SUIT for specific performance of a contract for sale of certain land.

The bill stated that a contract was entered into between the plaintiff and the defendant's agent, one Richard B. Cox, for the sale of 5½ acres of arable land, part of Section 162B, at the Reedbeds, for £750, on terms. The property belonged to the defendant, and Cox as his agent offered it to the plaintiff, on terms which he afterwards reduced to writing. Plaintiff informed the defendant thereof, and the latter replied that Cox had acquainted him with all that had transpired, and he would arrange matters; further, that the plaintiff might at once commence sowing and planting such crops as he desired to raise on the land. Plaintiff accordingly did sow and plant with the knowledge and consent of the defendant and partly in his presence. On September 3 plaintiff signed a memo. of agreement which embodied the contract, and Cox, who had prepared it, initialled it, and promised to get it ratified by the defendant. Plaintiff also paid part of the purchase-money at this time, but on the 28th September it was returned by the defendant, accompanied by a disclaimer of all liability in respect of the contract. On the 1st October plaintiff in pursuance of the agreement tendered £200 in further part payment, but defendant refused acceptance as before. The prayer of the bill asked that the defendant might be directed to perform his part of the contract, and that it be declared that the plaintiff was entitled on payment of the whole of the purchase-money to a transfer of the land under the Real Property Act, 1861; and meanwhile that the defendant

should be restrained by order or injunction from selling, encumbering, or dealing with the land in question.

The answer denied any arrangement with the plaintiff for the sale of the land on the terms stated by Cox, and denied any agreement in writing, or that Cox was authorized as defendant's agent to effect any such agreement as stated; but it admitted that he (defendant) had allowed the plaintiff to plant a few seeds, while giving him to understand "he had no right to do so, and he (defendant) would only allow him as a favour."

The replication joined issue on these points.

The plaintiff relied on the following documents put in on the evidence:—B—"King William Street, Adelaide, 21st August, 1877.—Mr. Marjoram.—Dear Sir—Will you take £700 for your property? If so I think I can sell it. You must let me know this afternoon. You had better come up and see me at once.—Yours truly, RICHD. B. COX." C—"King William Street, Adelaide, 3rd September, 1877.—Mr. Marjoram.—Dear Sir—Mr. Hamblin has signed the agreement, and will pay £100 on the 1st October (next month); the balance will be secured, £600, by mortgage, interest £7 per cent. for three years, interest payable quarterly from the 1st of November, the day when he takes possession. When you are in town, please call and sign the transfer. Mr. Hamblin will have to insure the house in your name as soon as he takes possession.—Yours truly, RICHD. B. COX. Mr. Hamblin wants you to get the lucerne sown, and he will pay you for it." D—"I have this day sold to Mr. Frederick Hamblin, who has this day bought from me, 5½ acres of land, part of Section 162B, as bounded in the plan in the margin of certificate of title, Register-book, Vol. vii., folio 38, for the sum of £750, to be paid as follows:—£50 cash deposit, £200 on the 1st October next, and the balance of £500 to be secured by a mortgage of the property at 7 per cent. per annum from the 1st day of November next. Interest to be paid quarterly and property to be insured in name of mortgagee. The said Frederick Hamblin to be entitled to possession on the 1st day of November next. As witness the hands of the parties hereto this

3rd day of September, 1877.—FREDERICK HAMBLIN." E—"Mr. Marjoram.—Dear Sir—Mr. Hamblin says he will pay £200 on the first of next month and sign a mortgage for £500 at £7 per cent. I think this will suit you very well, and you can't be better secured. I shall be down to see you on Sunday if all is well. Hoping you are both well, I remain, yours obediently, RICHD. B. COX. September 6, 1877. Don't forget the lucerne." F—"King William Street, Adelaide, September 4, 1877.—Mrs. Hamblin, Kingston Terrace, Lower North Adelaide.—Dear Madam—Mr. Marjoram called on me this morning and states that he must be paid another £100 on the 1st October in addition to the other £100, making together £200. You had better see Mr. Hewer at once and arrange the matter with him, otherwise you will lose the property. Yours truly, RICHD. B. COX." G—"September 6, 1877.—Received from Mr. F. Hamblin the sum of fifty pounds on purchase of Mr. Marjoram's property at Reedbeds—£50.—RICHD. B. COX." H—"King William Street, Adelaide, September 28, 1877.—Mr. Frederick Hamblin, North Adelaide.—Dear Sir—Mr. Marjoram called upon us yesterday and stated that he declined to sell the property at Reedbeds, and refused to sign any agreement whatever; so we enclose a cheque for £50, the amount you left with us, and we beg to state that we will have nothing further to do with the matter. Mr. Marjoram not having given us his written instructions, as you know, he cannot be made liable to carry out the offer unless he accepted the £50 left with us, which he would not do.—Yours truly, MATHEWS & COX. P.S.—As the matter has fallen through, no expenses are to be paid to us by you.—M. & C."

Smith, for the plaintiff, moved on affidavit to amend the bill in order to state the case with greater precision from facts unknown to the plaintiff until after evidence was taken—

1 Daniels Ch. Prac., 380
Walker v. *Armstrong*, 8 DeG., McN., & G., 531.

Andrews, Q.C., and *Kingston*, for the defendant, objected on the ground that it was new matter, and due diligence had not been proved in the affidavit.

Harvey & Others v. *E., S., & A. C. Bank*, 2 S.A.L.R., 199.

WAY, C.J.—I do not think the point turns on the question of due diligence. The amendment is one which a careful Equity draughtsman might find himself necessitated to apply for, as the case developed on the hearing. It would be a great failure of justice if the amendment were shut out, because it contains material facts discovered since the evidence was taken. I shall therefore order the amendment to be made on payment of costs of the motion and amendment.

Smith.—There was such a parol agreement for the sale of the land accompanied by a delivery of possession under that agreement that it amounted to part performance; and secondly, there was an agreement in writing by the defendant's agent, Cox—

2 Watson's Compendium of Equity, 954, citing *Bigg* v. *Strong*, 3 Sm. & G., 592
4 Watson's Compendium of Equity, 954
Fry's Specific Performance, sec. 352, p. 163, citing *Selby* v. *Selby*, 3 Mer. 2, Sugden's Vendors and Purchasers, (14th ed.), 144, 160.

As to the position of the signature—

Chitty on Contracts, last ed., 67.

In addition to the initialling there was an agreement constituted by connecting the several letters and documents—

Watson's Compendium of Equity, 952
Nesham v. *Selby*, L.R., 13 Equity, 191
Taylor's Evidence, secs. 937, 939, and 892
Fry on Specific Performance, 165-6
Buxton v. *Rust*, L.R., 7 Ex., 279.

The quantum of possession not material, but the quality or nature of the possession.

Foxcraft v. *Lister*, 1 W. & T. (3rd ed.), 693.

Cox was absolutely appointed by the defendant as his agent, and if not so appointed there is evidence of ratification by the defendant of Cox's acts—

Bigg v. *Strong*, 3 Sm. & G., 592
4 Watson's Compendium of Equity, 954.

Plaintiff was induced to raise money on mortgage on other property in order to purchase this, and that amounted to part performance of this contract, and dispensed with the necessity of a written contract—

Nunn v. *Fabian*, L.R., 1 Ch. Appeals, 35.
Coles v. *Pilkington*, L.R., 19 Equity, 174.

Planting a small portion of land was, like possession for one hour, part performance—

Ungley v. *Ungley*, L.R., 5 Ch. Div., 887.

Mutual assent to terms for possession, however small or partial, if referable to a contract is sufficient to constitute part performance, is the same as writing, and ousts the Statute—

Rossiter v. *Miller*, L.R., 5 Ch. Div., 648.

Andrews, Q.C., for the defendant—The cases cited on the other side establish only that there must be unequivocal possession, whereas here there was no possession at all. It must be not only an agreement but a complete agreement. In this case a parol agreement is set up, alleged to have been made on the 31st August, and according to the bill possession was given on the 1st September "in consequence of that agreement," which parol agreement was on the 3rd September reduced to writing by Cox. Hence it is apparent that, if there was any parol agreement, it was not a completed agreement, for it was "afterwards reduced to writing." Prior possession under a parol agreement can have no reference to a subsequent contract in writing. There was no part performance, nor any completed parol agreement, nor any

authority given to Cox to sign the contract, nor any writing by defendant, or by any one having authority under him, amounting to an agreement or contract between the plaintiff and the defendant. The letters of Cox to defendant, so far from disclosing the former as the agent of the latter, showed rather that he was acting for the plaintiff and that his (Cox's) object was to pocket £50 as his profit on the transaction. The first letter from Cox to defendant enquired whether he would take £700 for the property, and the memo. of agreement which he subsequently drew up, and which was duly signed by the plaintiff, but not by or on behalf of the defendant, stipulated that the purchase-money should be £750; but, in the next letter from Cox to defendant, within three days after plaintiff had signed the agreement, the purchase-money is referred to as £700 in these words:—"Mr. Hamblin says he will pay £200 on the 1st of next month and sign a mortgage for £500 at 7 per cent." The £50 was paid by plaintiff to Cox when plaintiff signed the agreement; and in his evidence Cox did not pretend he had authority to receive the money, and admitted that he did not receive the £50 as defendant's agent. Defendant did not even know Cox had received £50 until this action was taken. Cox also admitted that defendant never told him to sign the agreement. Defendant expressly and positively denied that he was bound by Cox. He told Cox he should require the agreement to be first submitted to him for approval. Cox only wrote his initials to vouch certain alterations preparatory to submitting it to defendant for his signature. He did not initial the document as applying to the whole agreement; moreover, he did not put his initials there till September 6. An estate agent has no authority to enter into an open contract for sale, and *semble* he has no authority to enter into any contract for sale—

Hamer v. *Sharp*, L.R., 19 Equity, 108.

As to what circumstances are sufficient to establish an agent's authority to enter into a contract—

Ridgway v. *Wharton*, 6 H. of L. Cases, 305.

The memo. in writing of the sale must state the price—

Elmore v. *Kingscote*, 5 B. & C., 583.

Where a written agreement is made "subject to the preparation and approval of a formal contract" it is not a final agreement of which specific performance could be decreed—

Winn v. *Bull*, L.R., 7 Ch. Div., 29*
Smith v. *Webster*, L.R., 3 Ch., Div. 49.

Initialling is not sufficient signature under the Statute of Frauds—

Hubert v. *Moreau*, 2 C. & P., 528.

A signature appearing in the body of an instrument does not constitute a contract within the Statute of Frauds—

Caton v. *Caton*, L.R., 2 E. & I. Appeals, 127.

As to connecting documents so as to form a contract within the Statute—

Hinde v. *Whitehouse and Another*, 7 East, 558
Ridgway v. *Wharton* (*ubi sup.*)

It is argued that the agreement, letters, and receipt clearly refer to each other and make one contract, but D contains no vendor's name, and on September 3 it bore no initials, and initials are insufficient, unless on the face of the document they refer to a name, and perhaps even not then. C is deceptive—it does not state the real purchase-money. F does not refer to D in any way, and, alone, is no contract. G does not refer either to D or F, and describes the property differently to that in D. E by its tone appears to be expecting an approval, not acting on a completed agreement; while H, returning the £50 to plaintiff, shows clearly that Cox was acting for plaintiff. Connecting two papers without any connection with a parol agreement is no argument at all, and, even if they are connected, there remains the question of agency. As to statements by Cox, which are sought to prove his agency for the defendant, not much reliance is to be placed on vague statements by third parties.

Ridgway v. *Wharton* (*ubi sup.*)

Kingston, on the same side, cited Daniels (5th ed.), 744.—The only signature alleged by the bill is Cox's, and that is only in the form of initials placed against certain alterations in the agreement. There is no sufficient allegation that Cox was defendant's agent with authority to sign this agreement, and it is absolutely necessary that plaintiff should charge that in order to satisfy the Statute of Frauds—

Vale of Neath Colliery Company v. *Furness*, 34 L.T., N.S., 231.

It is not charged that the letters sent by Cox to Marjoram or to Hamblin are memoranda signed by Cox sufficient to satisfy the Statute; this branch of the case therefore need not be considered. It is not competent for plaintiff to endeavour, without amending his bill, to get a decree on a contract which is not referred to in the pleadings as they at present stand. There is no evidence whatever in support of the allegation contained in the bill that the negotiations with Cox were completed before the interview between plaintiff and defendant on August 31. The planting of the lucerne forms no recognisable part of the case. It is not alleged in the bill; but, even if it were alleged, it could not be regarded as part performance. It was not done by the employé of the defendant, and therefore it is consistent with defendant's contention that he has not sold—

Frame v. *Dawson*, 14 Ves., jun., 386.

Before your Honor could give any consideration to the evidence as to the lucerne, plaintiff would have to amend his bill, and state distinctly that it was part performance. But no such amendment can be permitted now, for plaintiff ought to have remedied this objection, as his attention was called to it whilst the evidence was being taken. Cox was acting for the intending purchaser, who was to pay him; and all the facts of the case go to show that Cox was employed by plaintiff and not by defendant. Even supposing Cox had authority to sign the agreement, he did not exercise that power. There is no document, whether signed or not, which con-

tains all the terms, or refers to others sufficiently to allow them to be looked at. As to the admissibility of parol evidence connecting the various documents—

Boydell v. *Drummond*, 11 East, 141
Blagden v. *Bradbear*, 12 Ves., jun., 466
Dobell v. *Hutchinson*, 3 Ad. & E., 370.

Although Cox had signed the agreement at the foot with his full name it would not be a good contract—

Potter v. *Duffield*, 18 L.R., Equity, 4.

The agreement would be held to be incomplete, for, even with Cox's full signature, parol evidence would be required to show upon whose behalf he had signed. The agreement begins, "*I* have this day sold to," and that is signed by Cox's initials only. There is no suggestion that Cox's initials were intended as a signature on behalf of defendant; on the contrary, he positively swore he did not sign the agreement. Then it ends, "as witness the *hands* of the parties hereto." Defendant's name does not even appear in any part of that document, and Cox only initialled it where certain alterations had been made. Only plaintiff affixed his signature. Thus on the very face of the agreement, the Court will see that it is *not* signed by or on behalf of defendant, but only *intended* to be signed by him. There is no case in which the judgment (p. 508) in

Hubert v. *Turner*, 4 Scott's N.R., 486-508

is more applicable than this. As to what acts might be considered part performance to take the case out of the Statute of Frauds—

Lady Thynne v. *Earl of Glengall*, 2 H. of L., 131,

As to specific performance, if the agreement is substantially varied—

Nunn v. *Fabian* (*ubi sup.*)
Frame v. *Dawson* (*ubi sup.*)
Price v. *Salusbury*, 32 Beavan, 446.

The planting and sowing done on the 1st September could not be held to be an act of part performance, because it was not any term even of the alleged contract, nor done in pursuance of it; further, there was no contract in existence on 1st September. The offer had not been accepted, and the parties were never at any time, either before or subsequently, *ad idem*. No act done prior to the complete making of a contract can be held to be an act of part performance—

Parker v. *Smith*, 1 Collyer, 609.

The plaintiff has mistaken the effect of the decision in

Coles v. *Pilkington* (*ubi sup.*),

which is simply a question of valuable consideration and not of part performance.

Smith, in reply.—It is not necessary to allege everything in the bill. When all the facts are not within the plaintiff's knowledge it is sufficient to make a general allegation—

Daniels (last ed.), pp. 327 and 347.

As to Cox's signature and its connection with the agreement—

Addison on Contracts (4th ed.), pp. 45-6.

Unless it be expressed in the preliminary agreement that it is to be subject to some other formal one, the preliminary agreement is sufficient and binding. On the question of an agent initialling a contract—

Godwin v. *Francis*, L.R., 5 C.P., 295
Fry on Specific Performance, p. 189, sec. 419; p. 79, sec. 174; p. 82, sec. 185; p. 174, sec. 384; p. 175, sec. 386.
Ridgway v. *Wharton* (*ubi supra*)

was practically overruled or dissented from in the much later case of—

Heys v. *Astley*, 4 DeG., J., and S., 34
Wood v. *Midgley*, 5 DeGex, McN., & G., 41.

The letters referred to one subject-matter, and therefore were connected the one with the other. From them were ascertained the terms of the sale, and the agreement was directly connected with them.

Cur. ad. vult.

9 September, 1878—

WAY, C.J., now delivered judgment as follows:—This is a suit for specific performance of an alleged contract for the sale by the defendant to the plaintiff of a house and five and a-half acres of land at the Reedbeds. The document relied on as the agreement does not bear the defendant's own signature, and I am of opinion that the initials of the solicitor who was negotiating between the parties, and which were affixed to two alterations in the body of the document, do not amount to a signature by the defendant's agent so as to comply with the fourth section of the Statute of Frauds. Nor do I think that a binding contract under the Statute can be made out from the correspondence and the receipt stated in the pleadings and evidence. The circumstance of the plaintiff having acted on the defendant's permission to sow some seeds in the garden forming part of the premises was relied on as a part performance of the contract taking it out of the operations of the Statute. Both the plaintiff and his wife admit that when this was done the agreement was intended to be reduced into writing, and was therefore still incomplete. Nor was the seed sown in pursuance of any term of the alleged agreement. Possession was not to be given until November, whilst the sowing was done on the 1st of September. It was, in fact, on the defendant's part a favour granted to the plaintiff, and on the plaintiff's an expenditure of a few shillings for his subsequent advantage during a treaty which he believed would result in a purchase. It cannot be unequivocally

referred to as an existing agreement, and therefore does not amount to part performance of one. A suggestion was made during the argument that an arrangement under which the defendant had some lucerne sown at the plaintiff's request also amounted to part performance; but this contention was practically abandoned, nor was it set up by the plaintiff's bill. In the view which I take of the case it is unnecessary to discuss the other points which were elaborately argued by counsel on both sides. The plaintiff's bill will be dismissed, and with costs.

Dismissed with costs accordingly.

24, 25, AND 28 SEPTEMBER, 1877, AND 9 SEPTEMBER, 1878.

BIGGS AND OTHERS v. WATERHOUSE AND OTHERS.

REAL PROPERTY ACT, 1861.—*Certificate obtained by fraud—Cancellation—Caveat—Registrar-General—Parties.*

A bill of complaint, filed for the purpose of setting aside a certificate of title obtained by fraud, set out that a caveat had been lodged, forbidding the registration of any transfer of or other dealing with the land comprised in such certificate, the time for expiration of which caveat had been extended by Judge's order "until the 14th August, 1878." That at noon on the 14th August, 1878, an interim order had been obtained, restraining all dealing with such land.

That at 1 o'clock on the same date the Registrar-General had registered a transfer of the said land. That a further caveat had been lodged, which the Registrar-General threatened and intended to disregard.

Held—*That the caveat expired on the first moment of the 14th August, and that the Registrar-General had duly exercised his duty in registering the transfer as above mentioned.*

That no facts were stated to support the alleged threat of the Registrar-General to disregard the caveat, and that he was not properly made a party to the suit.

DEMURRER by the Registrar-General, who alleged that he had been improperly made a party to the suit.

The grounds of the demurrer were as follow:—1, that the Registrar-General had no interest and had omitted no duty to the plaintiffs; 2, that it did not appear that he had done, or threatened, or intended to do any wrongful act to the injury or prejudice of the plaintiffs; and 3, that his acts, if any, had been lawfully done in his capacity as Registrar-General.

The facts are stated in the head-note.

Ingleby, Q.C., for the Registrar-General.—The Registrar-General should not be made a party. The 133rd section of the Real Property Act is absolutely conclusive upon this, for it shows he is not liable to any action. There is nothing in this bill upon which

the Registrar-General can properly be made a party. The only charge suggested against him is in the 52nd paragraph, where it alleges that he "threatens and intends to disregard the caveat." A caveat was lodged, and the plaintiffs are perfectly protected by it. The plaintiffs have three remedies—1, to get a caveat; 2, to register a *lis pendens;* and 3, one of the remedies prayed for in the bill, viz., an injunction to restrain these defendants from putting in any transfer for registration. There is no allegation that any transfer has been put in so as to give rise to the apprehension mentioned in the 52nd paragraph. A mere statement of threatening to do an act that the Registrar-General has not the power to do is idle. He cannot threaten. He can only operate when moved by a document for registration. In the bill there is not one word which shows any personal act alleged to have been done by the Registrar-General. The caveat was in force for all time, until application should be made for its removal. There is no precedent whatever in the text-books of a person in an official character being made a party to a Chancery suit for committing a breach of his ministerial office to the detriment of some one else. (WAY, C.J.—Would not the lodging of a caveat raise a duty on the part of the Registrar-General towards the caveator? There is the charge here of his intention to register the transfer, and a caveat was entered against it.) The caveat expired on the first moment of the 14th August, and at 12 o'clock on that day your Honor made an interim order. Until the 14th means the last moment of the 13th. (WAY, C.J.—So I should think. What does the paragraph say?) The 46th paragraph sets out that on the 7th August an order was made by your Honor that the caveat should remain in force until the 14th August, or until the further order of the Court or a Judge. (WAY, C.J.—That means until the 14th, so that on the 13th it ran out.) The transfer was in when the Registrar-General sent notice to the parties of an intended registration, and the transfer was registered at 1 o'clock on the 14th. There is no allegation whatever that the Registrar-General knew of an interim order at that time, so that it stands entirely on the question whether the caveat was or was not in force on the 14th. There is no act done by the Registrar-General to found the plaintiff's charge. As to disregarding the caveat, *vide*

81 and 82 clauses of the Act. The Registrar-General has no power to act, say, or do anything until he is moved by a transfer or other deed being brought in. (WAY, C.J.—He has the physical power.) No; I don't think so. The presumption is always in favour of a person performing his duty. (WAY, C.J.—Supposing the Registrar-General registered a transfer for value, do you think the transferee would be bound?) He could only take it subject to any caveat. I don't think a bill would lie to restrain a person from stealing property. (WAY, C.J.—That has nothing to do with this.) In order to make out a case personally against the Registrar-General the plaintiff must bring a charge against him, and here there is no charge. (WAY, C.J.—But they say he "threatens and intends.") But if he did he might change his mind at any moment. (WAY, C.J.—No; he had not changed his mind up to the filing of this bill. He did intend.) If he intended to violate his duty, the remedy would be by prohibition and not by injunction. (WAY, C.J.—Your argument fails to convince me. If the Registrar-General "threatens and intends" to do what is alleged, I should think an injunction would lie against him.) After looking up every text-book on the subject, I can't find any case showing that an injunction would lie against a person filling an official and ministerial position. (WAY, C.J.—I do not think for my part that a prohibition would lie.)

Comyn's Digest, A. 3, p. 138.

A prohibition will lie to restrain a public nuisance. Where a charge is sought to be brought against a person that he is going to do an act which is contrary to law, it is not sufficient to put it in a vague form; the charge must set out facts. (WAY, C.J.—There is nothing to support it, except that statement in the paragraph you have referred to.) And there is nothing there in fact. Nor is the Registrar-General required to answer anything. The charge here should be as specific as a charge of fraud—

Lewis, 42.

(WAY, C J.—In that case it says you must show that it is a fraudulent act; not that a fraudulent act is going to to be done. They

say that the registration of a transfer before the caveat had expired was a wrongful act, and from that they assume that the Registrar might commit another wrongful act.) There must be something which the Registrar-General on oath may answer. The charge must be that he has done some wrong to some specific person at a particular place and time. The answer to the bill should be something on which perjury can lie—

Lewis's Principles of Equity Drafting, 67, 118.
Story's Equity Pleadings, 852.

(WAY, C.J.—I am rather inclined to think that par. 52 as to the threatening and intending is to be taken more by way of flourish. What was intended to be shown was that the Registrar-General registered a transfer before the order had run out.)

Symon and *Dashwood* for the plaintiffs.—Where a person has been made a party to a suit in order simply to obtain an injunction against him, it is not necessary that he should have any interest. All that is required of him is that he should have the control of the property, or that he should be in a position in which he might commit an act to the prejudice of the plaintiff. (WAY, C.J.—No; not that he is in that position, but that he will do the wrong.) Unless we are in the position to obtain a restraining order against the Registrar-General, we are not absolutely safe from the registration of a transfer. No doubt there is a statutory prohibition, but there is no machinery to protect us except by an injunction of the Court. According to Section 40 of the Real Property Act the transferee takes the land free from all encumbrances, liens, estates, or interests, except such as are notified on the Register-book. And even if there were a fraud on the part of the Registrar-General, which we do not suggest, Sec. 124 expressly says that "no action of ejectment or other action for the recovery of land shall lie against the registered proprietor, even in case of fraud, if he takes as a transferee *bona fide* for value." What was to prevent McEllister registering here? Sec. 133 of the Act does not apply, for we want to prevent the Registrar-General from doing something which would be prejudicial to our clients and for which, if done,

they would be without remedy. (WAY, C.J.—*Mr. Ingleby* would read that clause not only "any act done," but "*intended to be done.*") Supposing we are right in our construction of the order and the meaning of the word "until" the registration of the transfer would be illegal, and we would be without remedy against him by virtue of Sec. 133. (WAY, C.J.—No; because it would appear that the transfer was without value.) A strong inference may be drawn that the Registrar-General has not acted so fairly in this matter as he ought to have done. The suit is to cancel a certificate on the ground of fraud. The original certificate was obtained by Edward McEllister, and according to the bill it was obtained by fraud and a wilful false statement in his application, which was followed up by an action of ejectment by Mr. Guthrie, the person originally defrauded, and judgment was given in favour of Mr. Guthrie. McEllister acquiesced and yielded to the judgment, gave up possession, and did not attempt to interfere with the land in any way. At the time judgment was obtained no doubt the certificate might and ought to have been cancelled, and McEllister, I suppose, would not have objected to it; but afterwards we find Thomas Edward and Robert McEllister reasserting the fraud to the judgment in respect of which their father had submitted and now seeking to avail themselves of that fraud. All those circumstances were known to the Registrar-General. He was the person before whom the fraudulent application by McEllister had been declared; and not only so, but when the action for ejectment took place he actually had notice of it, for it was followed up by a petition to this Court under Sec. 135 of the Real Property Act and an application to the Registrar-General himself to cancel the certificate on the ground of fraud. This is the matter referred to in the 42nd paragraph of the bill. Certainly it was not obligatory for him to take those proceedings; but by Sec. 135 of the Act it is provided that he may take the initiative and send on to the Supreme Court any cases of this kind where gross fraud is made manifest. The Registrar-General, whose duty it is to see that his office is not made a vehicle for fraud, should have taken the steps clearly required of him by the Act. Sec. 12, Sub-sec. 5, further defines his duty, and empowers him to enter a caveat himself for the prevention of fraud or improper dealing. Is

the Registrar-General to come here and say, after getting notice of all those matters, that, immediately after the caveat had lapsed, he was bound to register this fraudulent transaction? Under those circumstances, it was not for him to wait till some one lodged a caveat; the caveat might run out by inadvertence or accident, and it was his duty to lodge such a caveat as I have mentioned, or to have taken the steps asked to be taken under the 135th Sec. But, so far from doing this, he proceeded to register this fraudulent dealing at the very moment the caveat was run out. When the transfer came in, if it was not his duty to lodge a caveat before, it was surely his duty to lodge it then. His acts were at least such as facilitated the operations of the persons committing this fraud. He is not the person to come here and say, "I come with entirely clean hands; I have discharged my duty faithfully and properly; I have kept an impartial position throughout, and being a merely ministerial officer I ought not to be restrained." Before he can come here and say that he is merely a minister in the matter, he must come not only with clean hands, but after having done everything incumbent upon him by the letter and spirit of the law to prevent any fraudulent dealing. In

Deare v. *The Attorney-General*, 1 Y. & C., 197,

the CHIEF BARON said—"It has been the practice, which I hope will never be discontinued, for the officers of the Crown to throw no difficulties in the way of proceedings in a Court of Justice." The Registrar-General ought not to put himself in the position of having it said that he did not do all in his power to prevent what was clearly a fraud. Demurrers on technical points are not encouraged by the Court, for it is quite clear in this case that we are entitled to a discovery from the Registrar-General with reference to all that has taken place as to the cancelling of that certificate and the granting of the new certificate. Mr. McEllister is dead, and the Registrar-General is the only person who can give accurate information in the matter. It was he who took the first application as Deputy-Registrar, and everything connected with it subsequently has taken place in his office. This demurrer would have the effect and was probably intended to prevent a discovery from the

Registrar-General. Wherever the Courts see that a demurrer is altogether beside the justice or merits of the case, they cast about for some ground for overruling it. Your Honor knows that the rule laid down in

Brooke v. *Hewitt*, 3 Vesey, 255,

is that a demurrer will not be upheld unless it is absolutely certain that the bill will be dismissed on the hearing. Now, can it be said in this instance that there is such a certainty? Also, in the case of

Giles v. *Wooldridge*

His Honor Mr. Justice STOW put it that, with regard to an interlocutory injunction, the question was whether a fair *primâ facie* case had been made out. In

Deare v. *The Attorney-General*,

before cited, the principle is put that in case of any doubt whether a demurrer may be sustained the safest course is to overrule it. Acting upon that doctrine, if there is any doubt here, this demurrer must be overruled. With respect to the interpretation of the word "until" in an order, the rule and practice of Common Law is that it includes the day to which it is prefixed, although it is admitted that the word is ambiguous. As a matter of practice in the Courts it is so treated—

Kerr v. *Jeston*, 1 D., N.S., 538.

The distinction is that where the phrase "until after" a certain number of days from an act done is used it means clear days; whereas until a particular day is exclusive of the first day and inclusive of the day to which the word "until" is prefixed—

Chitty (12th ed.), 164.

(WAY, C.J.—The necessary corollary of your argument is that if it said until after the expiration of Tuesday, you would have all Wednesday.) No; from a day until after the expiration of so many days means clear days. Then there is no provision in the Real Property Act for registering a *lis pendens*. (*Ingleby, Q.C.*—I quoted the Equity Act.) But the Real Property Act, Sec. 41, says

the Registrar-General shall not register any instrument purporting to transfer or deal with land under the provisions of the Act, unless such instrument be in accordance with its provisions. (WAY, C.J. —Misconduct by the Registrar-General as an official would be a misdemeanour.) Whether a misdemeanour or not, we are entitled, as of right, to come to this Court and obtain an injunction to prevent any act to our prejudice; and no person is bound by any order of the Court unless he is made a party to the suit—

Smith's Ch. Practice (7th ed.), 294.

(*Ingleby, Q.C.*—Since I addressed the Court I have found that in the case of

Brady v. *Brady and Others*, 8 S.A.L.R., p. 219,

it was decided that the Registrar-General is not a necessary party.) That does not touch upon the point involved in this demurrer. In

Calvert on Parties, 385 (7th ed.), citing *Tunstall* v. *Boothby*, 10 Sim., 550,

upon an application to restrain the Receiver-General, the Vice-Chancellor said he felt considerable hesitation, without having the Lords of the Treasury or the Commissioner of Customs before the Court, on the principle stated by Mr. Calvert that the Court is unwilling to make an order affecting the authority of officers of the Crown unless they are actual parties; and that is acting on the same principle as is observed with regard to private individuals who are not to be affected by the order of the Court unless parties. The case of

Ellis v. *Earl Grey*, 6 Sim., 323,

is a very strong authority that merely ministerial officials are made parties in order to be restrained, even where they have acted and may be expected to act perfectly *bona fide*. (WAY, C.J.—That is a very strong case in your favour.) We have a right to come apart from a caveat or any other remedy; we are entitled to our land; we are not bound to rely on an action for damages, but are entitled to an injunction. During the last century it was the

invariable practice to make the Governor and Company of the Bank of England parties to suits with reference to stock, for the purpose of restraining them from transferring stock till the decree itself should be obtained—

Smith's Ch. Practice (7th ed.), 294.

This, however, was found to be inconvenient, and to remedy it the Statute 39 and 40 Geo. III., c. 36, was introduced. It is the right of the subject to come to this Court and ask an injunction. (WAY, C.J.—Yes; but I suppose before that Statute it was not necessary to charge any threats to transfer.) The threat by the Registrar-General is immaterial. We are entitled to complete protection, and to have our property absolutely secured until the decree is made settling whose the land is. But even after that Statute the Governor and Company of the Bank of England were made parties—

Temple v. *Bank of England*, 6 Ves., 772.

There is introduced into the Merchant Shipping Act a similar provision to that in the case of the Bank of England, enabling parties to come into Court and get an injunction, which it is declared that the Registrar without being made a party shall obey—

Sec. 65 Merchant Shipping Act
Hall v. *Lack*, 7 Jur., 527.

The Receiver-General of Customs has been made a party too; and still more extraordinary, a Sheriff has been restrained from paying over the proceeds of an execution—

Calvert, p. 385, citing *Bevan* v. *Lewis*, from 1 Simon 376.

But in Calvert, 303, it goes further, for there it shows that it is unsettled whether the Receiver, although an officer of the Court of Chancery and subject to its order, may not be made a party to a suit. The principle in regard to public officers is well stated in Calvert, 385, that a public officer is not made a party to restrain him from performing a public duty, but that a violation of a private right can never be part of his public duty. Putting it the other

way, that we had not made the Registrar-General a party and a transfer had been lodged for registration, and he gave us notice, then we must have applied to the Court, and amended our bill by adding him as a party and got a restraining order. But apart altogether from the construction of the technical argument, we are entitled to have the property forming the subject of the suit protected. If the Registrar-General believed that the order expired on the 13th, it was his duty to give notice of it and of his intention to proceed next day. There is no vagueness about par. 52, as alleged by our learned friend; it is a distinct charge that the Registrar intended to disregard the caveat. We are entitled to have him as a party for the purpose of discovery and relief. We are therefore not merely entitled to a restraining order, but there are many matters in the scope of this bill within the Registrar-General's knowledge which we have a right to discover.

Ingleby, Q.C., in reply.—It is not suggested that the Registrar-General was aware of any of the transactions anterior to the 1st of April, when application was made for the cancelling of the certificate of title. With respect to the meaning of the word "until" in the order it does not include the 14th day of August. (*Symon* referred to the cases of

Rex v. *Stevens & Agnew*, 5 East, 244,

where it was held that the day to which the order was made ought to be included.) If I give my clerk leave to stay away till Monday, that means that he is to come back on Monday. (WAY, C.J.—I should think so. If the facts had been brought to the Registrar-General's knowledge, I should have agreed with Mr. Symon that he ought to have entered a caveat himself. The case, however, appears to me now to turn upon the second branch, as to whether a ministerial officer may be made a party in order to be restrained. How do you get over the case of *Ellis* v. *Earl Grey*?) The 150th section of the Equity Act distinctly enacts that an order made by the Court or in Chambers may be registered by a caveat, so that this is equivalent to the section in the Merchant Shipping Act. No case ever existed upon which any department of the Government was restrained apart from contract or trespass. (WAY, C.J.—Well,

so far as that goes, the Registrar-General is an officer and has a duty. I suppose an injunction would lie against the Commissioner of Railways)—

Daniel's Chancery Practice, 5th ed., c. 37, p. 1537.

The 4th sec., c. 6, of 5 Vic. is similar to the 65th clause of the Merchant Shipping Act. The case in 6 Simon cited is unsupported. It was a case *sui generis*, and only applied to money. There is a most material distinction between making a person who was a stakeholder, and upon whom a claim might be made by interpleader, a party to a suit and the present case. In

Rankin v. *Huskisson*, 4 Sim., 13,

the Registrar-General acted judicially when he registered a transfer, and he had a discretion. The plaintiff here has no authority to interfere with the public duties of the Registrar. (WAY, C.J.—The point is whether it is permissive to make him a party. I think it would be very much better if the Real Property Act were assimilated to the provisions of the Merchant Shipping Act.) With regard to the statement that the Registrar-General is a public functionary, I call attention to sections 4, 5, 6, 11, and 12 of the Act. (WAY, C.J.—There is no doubt he is a public functionary. *Quâ* judicial functionary, he may lodge a caveat; *quâ* ministerial functionary, he may register a transfer.) The whole scope of the Act shows that he shall not be made a party; that he shall not be drawn into litigation. The 150th section of the Equity Act is the complement of the Real Property Act in the matter of caveats. In no instance except that of

Ellis v. *Earl Grey* (*ubi supra*),

has a public functionary been made a party, and if your Honor makes this order you will have to develop that case.

WAY, C.J.—The main point of this demurrer is whether or not it is permissive now to make the Registrar-General a party. I don't think anything of the charges of misconduct. I shall consider whether or not under the present state of the law, the property being

protected in the way you have pointed out, it is permissive to join the Registrar-General in the same way as the Governor and Company of the Bank of England. The question of costs will be a matter for further consideration.

Cur. ad. vult.

9 September, 1878—

WAY, C.J., now delivered judgment as follows:—During the argument I stated that the charges of misconduct against the demurring defendant—Mr. Andrews, the Registrar-General—had altogether failed. He is already prohibited, by the 83rd section of the Real Property Act, from registering any transfer or other instrument affecting the land in dispute whilst the caveat remains in force, as effectually as he could be by the injunction of the Court, and no facts are stated in the bill to support the general allegation that he intends to disregard the Act of Parliament under which he holds his office. The objection that, should the plaintiff succeed in the main object of the suit, there will be no power to order the Registrar-General, if not a party, to cancel the certificate of title said to have been fraudulently obtained appears to me to be met by the 137th section of the Real Property Act, as an interest in the land, that is to say the possession thereof, has been recovered in the action of ejectment mentioned in the bill. It was urged that the Registrar-General ought to be retained as a party for the purpose of discovery. This, however, is not a bill for discovery but for relief, and, the case for relief against the Registrar-General having failed, his demurrer will be allowed; but, as this is a case of first impression and of much difficulty in the construction of an Act of Parliament, without costs.

Demurrer upheld without costs.

GWYNNE, P.J.] [EQUITY.

26 SEPTEMBER, 1878.

GIBSON v. STAKER AND OTHERS.

WILL.—Construction—Infants—Trustee Act, 1855-6—*Partition—Sale.*

A Testator by his will gave the whole of his property to his seven children, "the same to be equally divided among them; each of them to receive their respective shares in rotation at the time of their becoming of age, the property to be valued at that special time, and the amount of the respective share to be fixed accordingly."

The property was of the value of £2,000 *or thereabouts.*

On suit instituted by the eldest child on attaining his majority,

Ordered—*That the property be sold, the costs of the suit paid out of the estate, the eldest son's share handed over to him, and the balance of the proceeds of sale invested for the benefit of the infant beneficiaries by the Master of the Court.*

THIS was a suit instituted by Samuel Gibson for the purpose of obtaining his share in the estate under the will of his father, the late William Gibson. The will in question was executed on the 28th April, 1871, and was as follows:—"This is the last will and testament of me, Wm. Gibson, farmer, of near Allendale, in the Province of South Australia.—I give, devise, and bequeath the whole of my property to my children Samuel Gibson, Catherine Gibson, Wm. Gibson, Robert Gibson, Margt. Gibson, Henry Gibson, and James Gibson, the same to be equally divided among them; each of them to receive their respective shares in rotation at the time of their becoming of age; the property to be valued at that special time, and the amount of the respective share to be fixed accordingly. In case of my wife and the children not being able to agree among themselves, and the children or my wife preferring to leave the property, the children shall be liable to pay to my wife the sum of twenty-one shillings per week maintenance; and in case of my wife marrying again, she is to receive the sum of £100 sterling out of the property. And I appoint my wife Mary sole executrix of this my said will up to the time when the children become of age, provided she remains a widow. In case of her getting married

again, I appoint Mr. James Kester and Mr. John Rusbridge executors in my wife's stead." This will was duly proved by the testator's wife on June 3, 1871, and, on the 21st October following, she died, having first intermeddled with the estate and effects, leaving part of the same unadministered. Letters of administration were then granted on the 10th May, 1872, to Peter Henderson, John Rusbridge, and James Kester (parties to this suit) for the use of the children until one of them should attain the age of twenty-one years. The defendant Catherine intermarried with the defendant Albert Staker after the testator's death. Plaintiff attained his majority on the 25th August, 1877. The other children, who, with Peter Henderson, James Rusbridge, and James Kester were defendants inthe suit, were infants. The estate consisted of certain sections of land of the value of about £1,800, and of about £200 in money. The bill prayed for an order for sale of the land, or for a partition, or that the amount of the plaintiff's share might be raised by mortgage of the land, and that for purpose of carrying out such sale or mortgage, the plaintiff and defendants might be declared trustees within the meaning of the Trustee Act, 1855-6.

Downer, Q.C., and *H. F. Downer*, for the plaintiff.—The plaintiff is entitled under the will to payment of his share, and that payment can only be effected by a partition, or by sale or mortgage of the property or some part of it. It is clearly to the advantage of all parties that a sale should be made, rather than that a fresh suit should be instituted on each child attaining majority. The Court has power to order a sale in lieu of a partition, where it is clearly for the benefit of all concerned—

Story's Equity, 654 (11th ed.)
Hubbard v. *Hubbard*, 2 H. & M., 38
Davis v. *Turvey*, 32 Beav., 554.

The mode of carrying out such sale is to declare the beneficiaries trustees within the meaning of the Trustee Act, 1855-6.

Emerson, for the defendants, submitted to such order as the Court might make.

GWYNNE, P.J.—A sale is obviously to the advantage of all parties, and I shall therefore make an order for sale as prayed. Costs of all parties to be paid out of the estate.

Decree for sale.

26, 28, AND 29 NOVEMBER, AND 3 DECEMBER, 1877;

1 APRIL AND 16 SEPTEMBER, 1878.

THE ATTORNEY-GENERAL v. O'SULLIVAN AND OTHERS.

WASTE LANDS ACT, No. 14 of 1868-9, No. 4 of 1869-70, No. 27 of 1870-1.—Purchase on Credit—False declaration—Waiver—Agreement—Voidable not void—Land Grant obtained by Fraud—Concealment.

O. became the purchaser of a certain section of land numbered 217, and, on the 19th July, 1871, entered into an agreement in the form prescribed by the 1st Schedule of Act No. 14 of 1868-9. O. entered into and remained in possession until the 28th February, 1873, when he authorized M. to take charge of the section on the terms of the following agreements:—"February 27, 1873.—I hereby empower M. to take charge of my Section No. 217 in my absence. —O." "28th February, 1873.—Agreement between O. and M.—O. agrees to let M. have Section No. 217 for £31; M. agrees to carry out all improvements according to the Act, and also to pay the next instalment of rent on the 19th July, 1874, £31 14s. O. agrees to attend on the day of purchase and transfer over to M. all his title and interest in the aforesaid Section No. 217 for the sum of £317.—O.—M." M. remained in possession and resided on the land from the date of the above agreement until the institution of the suit, but the conditions of the agreement, except as to payment of the purchase-money, were not carried out. On the 19th March, 1873, O. became the purchaser upon credit under the provisions of the Waste Lands Alienation Act, 1872, of Section No. 120, Hundred of Appila, distant 130 miles from the said Section 217, and entered into the requisite agreement. On the 28th February, 1876, O. applied to be allowed to complete his purchase of the Section 217, and by declaration made before K., a J.P., alleged that he had carried out all the conditions of his agreement. The Commissioner refused to accede to O.'s application, on the ground that neither the residence nor improvement clauses of the agreement had been complied with. O. thereupon wrote, and subsequently called on the Government Valuator, pointing out to him that he understood that compliance with the residence and improvement conditions in one of his two selections was sufficient for both, and that he had resided on the Section 120 and effected improvements of the requisite character and value on that section and Section 217 combined. On this O. was allowed to complete his purchase, and the usual Treasury receipt for the purchase-money was issued, on which a mortgage to C. to secure the amount of the purchase-money advanced was registered by K. The land grant to O. was afterwards issued, and the mortgage to C. duly registered on same.

The Government had no knowledge at the time of receiving the purchase-money and issuing the land grant of the agreement between O. and M.

On bill filed, setting out the above circumstances and praying that the land grant might be ordered to be delivered up and cancelled with costs as against the defendants, but not offering to return the purchase-money or indemnify C.—

Held—1. *That all breaches, except as regards the agreement between O. and M., had been waived by the Commissioner.*

2. *That the bill should have contained an offer to return the purchase-money and interest—to pay the defendant C. his principal and interest with costs—and on the same being amended accordingly—*

Decreed—*That the agreement between O. and M. was a fraud under the Waste Lands Act,* 14 *of* 1868-9.

That the concealment of that agreement by O. from the Government was a fraud.

That the land grant be delivered up and cancelled.

That the bill be dismissed as against the defendant M. without costs.

That the defendant O. pay the costs of suit.

That the Commissioner pay to O. all costs incurred by him through the joining of the defendant C. as a party to the suit.

Semble—*That agreements under the above-mentioned Acts are not void on breach of any of the conditions, but voidable only at the suit of the Crown.*

Quære—*Whether a land grant, obtained by fraud, is not good as between the Crown and innocent purchasers or mortgagees for valuable consideration?*

THIS was an information filed by the Attorney-General as plaintiff, which alleged, that, after the making and passing of the Acts No. 14 of 1868-9, No. 4 of 1869-70, and No. 27 of 1870-1, relating to agricultural areas, the defendant O'Sullivan, on the 19th July, 1871, applied in the form of the 4th schedule of the first-mentioned Act to become the selector of Section 217 in Troubridge Area, Hundred of Melville, containing 317 acres, for £317; that such application to purchase was made in the terms provided by the said Act; that he paid with his application £31 14s., the first instalment of interest; that the application contained the usual declaration as to being entitled to select; that, on the said date, the selectors' agreement pursuant to the said application and in the form provided by the 5th schedule of the Act of 1868-9 was entered

into between him (O'Sullivan) and the then Commissioner of Crown Lands; that, at the date of that agreement, certain regulations had been made by the Government pursuant to the said Act, which were then in force (the most material being Nos. 41, 42, 45, 49, 50, 51, 52, 54, 55, 56, 58, 59, 61, 62, 63, 64, and 69); that under that agreement O'Sullivan took possession of the said section within six months of the date thereof, and continued in possession until the 28th February, 1873; that he subsequently authorized the defendant Manning to take charge of the section, and entered into an agreement with him for the sale and transfer to him the said Manning of all his title and interest in the same, as follows:—"February 27, 1873.—I hereby empower and authorize Mr. John Patrick Manning to take whole charge of my section, No. 217, on Troubridge Area, in my absence.—EDMOND O'SULLIVAN. Witness—Michael Kenny." "February 28, 1873.—An agreement between John Patrick Manning and Edmond O'Sullivan. Edmond O'Sullivan agrees to let John P. Manning have Section No. 217, on Troubridge Area, for £31 (thirty-one pounds); John P. Manning agrees to carry out all improvements according to the Act, and also to pay next instalment of rent on 19th day of July, 1874—£31 14s. Mr. O'Sullivan agrees to attend on the day of purchase and transfer over to John P. Manning all his title and interest in the aforesaid section, No. 217, containing 317 acres, for the sum of £317 (three hundred and seventeen pounds.)—EDMOND O'SULLIVAN, JOHN P. MANNING. Witness—Michael Kenny." The information charged that the latter document amounted to a sale and transfer, and was a fraud on the Act; that, immediately after becoming a party to it, O'Sullivan left the selection, and gave up possession to Manning, who took and kept possession, and had resided thereon ever since; and that O'Sullivan did not fulfil any of the conditions of the selectors' agreement in respect of the land, except as to paying the purchase-money. That on the 19th March, 1873, he (O'Sullivan) applied under the Waste Lands Alienation Act, 1872, to become the selector of Section 120 in the Hundred of Appila (130 miles distant from the former selection), containing 194 acres, for £194, and paid £19 8s. of the interest thereon in advance; and the same day an agreement in the form provided by the said Act was entered into between him and the then Commissioner of Crown Lands for

the purchase of the said section, after which he entered into possession and had kept possession ever since. It further alleged that Manning paid the second instalment of £31 14s. in respect of Section 217 on the 24th July, 1874, and that the Government had no notice that such sum was not paid on account of O'Sullivan. Also that on the 6th July, 1874, and on the 26th March, 1875, O'Sullivan made and signed returns as to improvements and residence on both the said sections, and did not state that he was not residing on Section 217, nor that he had entered into the said agreement with Manning, and given possession thereunder to Manning. That on the 28th February, 1876, O'Sullivan by application and declaration in writing made before Mr. M. Kingsborough, J.P., applied to become the purchaser of Section 217, representing that he had made substantial and permanent improvements at the value of 10s. per acre, and had resided on the land for three years and fulfilled all the conditions of the selectors' agreement; whereas those representations were untrue, and Mr. Kingsborough knew it. That, after the receipt of that application, the then Commissioner of Crown Lands on the 1st March, 1876, declined to comply with it, on the ground that the Inspector had reported that neither of the conditions as to residence and improvements had been fulfilled. That on the following day O'Sullivan sent a letter to the Government, pointing out that when he made his selection in the Hundred of Appila, he was assured in the Land Office that improvements placed upon either selection would count for both, and claiming to have that assurance given effect to. That O'Sullivan about the same time personally interviewed the Government Valuator and made similar representations to him, whereupon the latter withdrew his opposition to the application, and O'Sullivan was allowed to complete the purchase on the 11th March, 1876, by paying to the Treasury £317, for which he obtained the usual Treasury receipt, and on the 3rd June following the land grant was issued to him. The information charged that none of the officers of the Government knew anything about the agreement with Manning until after the grant was issued, when a dispute took place between O'Sullivan and Manning; and that O'Sullivan fraudulently concealed from them the fact of such an agreement existing and of the occupation by Manning. It further charged

that the £317 paid to the Treasurer was borrowed by O'Sullivan from Mr. Kingsborough, and that subsequently on 11th March, 1876, the defendants Clark lent to O'Sullivan £450 on a mortgage of Section 217, which was registered on the Treasury receipt pursuant to section 100, Real Property Act, 1861, and afterwards notified on the grant; also that the said mortgage was executed in blank before the loan was negotiated, and was prepared and attested by M. Kingsborough, who it was alleged acted as broker for O'Sullivan in procuring the loan and preparing the mortgage deed, and who, by registering it at the request of the defendants Clark, became their broker and rendered them chargeable with such notice of the premises as he had. That thus the grant was obtained by fraud, and being improvidently issued it ought to be cancelled. Prayer accordingly, and for injunction to restrain the defendants from parting with the grant or dealing with the land. The answers of the defendants O'Sullivan and Manning admitted most of the charges in the information, but alleged that the grant was not obtained by any fraud, inasmuch as the Government officials knew of the whole circumstances alleged to be untrue at the time they issued the grant. The answer of the defendants Clark denied that either they or Kingsborough had any knowledge whatever of the circumstances alleged as fraudulent under the Act, and stated that Kingsborough was not under any circumstances their agent in completing the loan to O'Sullivan, which was negotiated with them by Kingsborough as O'Sullivan's agent in the ordinary way by proposal and valuation; and that, as they were innocent mortgagees, without notice, the grant ought not to be set aside to their prejudice, or the prejudice of their security. The evidence did not establish any knowledge by the Crown of the agreement.

Boucaut, Q.C., for the Attorney-General.—The remedies possessed by the Crown and the remedy given in the Statute are cumulative—

Maxwell, 368
Ross v. *Rugge-Price*, L.R., 1 Ex. D., 269
Sharp v. *Warren*, 6 Price, 131

particularly where the Crown is concerned—

Chitty on Prerogative, 383
Ex parte Bishop of Exeter, 19 L.J., N.S., C.P., 200.

It might be contended that there was a waiver on the part of the Crown—

Chute's Equity in relation to the Common Law and Judicature Act, 141.

As to the *locus standi* of the Crown to revoke for fraud—

Sawyer v. *Vernon*, 1 Vernon, 278
Magdalene College Case, 6 Coke, 125
Eastern Archipelago Co.'s Case, 2 E. & B., 856
McBride v. *Lindsay*, 9 Hare, 574
Regina v. *Hughes*, L.R., 1 Privy Council, 81
Chitty on Prerogative, 396-7
Alcock v. *Cooke*, 5 Bingham, 340.

It might be contended that the Crown ought to have proceeded by writ of intrusion, but the Crown could sue in any Court—

Morgan v. *Seaward*, 2 M. & W., 544.

The mortgage, having been executed in blank, was void—

Hibblewhite v. *McMorine*, 6 M. & W., 200
Hunter v. *Walters*, L.R., 11 Equity, 292
Swan v. *North British Australasian Company*, 7 H. & N., 603.

(STOW, J.—Although that is the law with respect to deeds it is altogether different with regard to documents other than deeds. For example, a bill may be filled up with any name.) The form in schedule F of the Real Property Act, 1861, seems to contemplate the filling in of all particulars before signature. (STOW, J.—The main point is, supposing a man obtained a certificate of title by fraud, and then mortgaged it to an innocent person, what would be the position of the latter?) The mortgage in that case would fall with the certificate, as decided by the Primary Judge in

Brady v. *Brady*, 8 S.A.L.R., 219.

(STOW, J.—If that case were on all fours with this I should be bound by it, but I shall require to be satisfied that it is so.) The grant in this and the certificate in that case were equally bad, inasmuch as they were fraudulently obtained; and the interests of the mortgagees, therefore, were in the same position in each case. (STOW, J.—The generic term "registered proprietor" seems to you wide enough to include the Crown. Apart from the decision in *Brady* v. *Brady*, I should not see my way clear to set aside a mortgage of this description. It appears to me that under the Real Property Act the proprietor of any mortgage is protected unless he has been guilty of fraud.) I submit not, and here the mortgagees cannot be regarded as innocent parties, because Kingsborough, who was their agent, had knowledge of the fraud—

Cumming v. *Forrester*, 2 J. & W., 334
The Annandale, 37 L.T., N.S., 139.

Barlow, on the same side.—The evidence of the breaches of the Act on the part of the defendants is in writing, and the Messrs. Clark ought not to be allowed any protection as against the Crown. (STOW, J.—That argument leads to the conclusion that *bona fide* purchasers may be defeated at any length of time, which would be a very serious matter. No one dealing in land, either by mortgage or purchase, would under such circumstances be safe.) I shall still attempt to impute notice to the Clarks. Under the 16th section of the Act a transgressor is not entitled to his grant, and if issued it would be improvident. Sections 2 and 3 of the Act 4 of 1869-70 require proof of residence during the first year; and, if the selector completes within five years, proof of his residence for three years. O'Sullivan's agreement bound him to conditions of residence and improvements with which he has not complied. He was bound to give proof to the satisfaction of the Governor during the first year that he was a *bona fide* occupier, and he did not do so, as the evidence proves. He says that when he applied for the Appila selection he was informed in the Lands Office that the improvements on one section would do for both; but by regulations 41, 42,

and 45 it was provided that all lands held by persons on credit must be contiguous, that residence must be for nine months in each year, and that failure to comply with the residence condition rendered the agreement liable to forfeiture. In this instance the Appila selection was 200 miles away from the selection he held in the Hundred of Melville; and in his answer he admitted that he went into possession on the 8th August, and only remained in possession for about four months. As to the point relative to improvements and sending in returns to the Government in respect thereof, under the 52nd regulation, O'Sullivan could not claim for improvements on the 217 selection, as he had held that and the other selection by different agreements. Besides, in his answer he had admitted that the improvements on the former selection were not made by himself, and the returns he sent in were incorrect. Then the agreement with Manning was illegal under the eighth condition of the selector's agreement, which prohibited any assignment of, or attempt to assign the agreement. Therefore the authority under which Manning got possession was illegal, and the defendants continued to carry out this illegal agreement until O'Sullivan refused to complete his part of the bargain. (STOW, J.—I do not see that Manning is a necessary party to this suit.) But he assisted in making the false returns, and that was part of the actual fraud. He took possession under O'Sullivan, resided on the land, and made various improvements. (STOW, J.—But you have not charged that he deliberately defrauded the Government. How then can you make him a necessary party? All I see is that he assisted in obtaining the grant, and had an interest in it; but these things are not pleaded with sufficient particularity in the information.) His paying this money, making the improvements, and continuing in occupation were all done to enable O'Sullivan to procure the grant. (STOW, J.—But you don't say that on the bill. You say simply that the grant was fraudulently obtained.) If your Honor is against me in that, I then admit that the case cannot be supported further as to Manning. (STOW, J.—I will reserve the question of costs for argument.) There is no difference between a transfer and an agreement to transfer—

Pollock on Principles of Contract, 237

Chambers v. *Chambers*, Vic. L.R., 1876, Eq., 179
Tozer v. *Somerville*, Vic. L.R., 1875, Eq., 262.

O'Sullivan's purpose in carrying out the agreement is shown by certain letters written by him to Manning, in one of which he wrote :—"Do what will save me and suit yourself best." O'Sullivan obtained the grant by means of the declaration he made on 28th February, 1876. That declaration set forth that he resided on the land for five years, which was a manifest impossibility, for the five years did not expire till the 19th July. (STOW, J.—But that was patent on the face of the declaration, and was therefore known to the Government. You will have to talk a long time before you convince me that that was fraud.) O'Sullivan had also declared that the improvements made on Section 217, alone, amounted to £158 10s., whereas his letter of 2nd March showed that he had not made improvements on that section. (STOW, J.—But that also was known by the Government. He afterwards corrected his statement. You can't show that by that statement in the declaration he got the grant.) O'Sullivan ought to have disclosed his agreement to transfer to Manning. With respect to the rights of the Crown to cancel grants obtained by fraud---

Morgan v. *Seaward* (*ubi supra*)
The Eastern Archipelago Company v. *The Queen* (*ubi. sup.*)

(STOW, J.—But the main question is whether persons claiming under a Crown grant are deprived of their rights as against the Crown at Common Law, and whether that point is affected by the Real Property Act).

O'Shanassy v. *Joachim*, L.R., 1 App. Cas. 82.

And with respect to the point more particularly affecting the Messrs. Clark, as to derivative titles—

Cumming v. *Forester* (*ubi. sup.*)

This mortgage came within the term "Securities" in sec. 18 of Act 14, 1868-9, for it was made with intent to violate the Act.

(STOW, J.—But that was done after the Treasury receipt for the money had been obtained, and he could then do anything he liked with his estate. Where is there any evidence of such an intent on the part of the Clarks or of Kingsborough? I cannot see that the transfer comes within that section.) Kingsborough, at all events, knew that the conditions had not been fulfilled. He substantially had a part in the registration, for he acted on behalf of the Messrs. Clark. (STOW, J.—When a solicitor is engaged to draw up a mortgage, he always looks to the mortgagor for payment; and I must say I cannot at present see any difference between a solicitor and a landbroker. They occupy an analogous position.) The mortgagees must be deemed to have had notice of the fraud—

Majoribanks v. *Hovenden*, Dru., 11
Nixon v. *Hamilton*, 2 D. & W., 364
In re Rorke, 14 Ir. Ch. R., 442.

As to the statement of the mortgagees that they were in ignorance of the agreement—

Wason v. *Wareing*, 15 Beav., 151.

It was their duty when in the position of intending mortgagees to make enquiries as to who was in possession. (STOW, J.—I don't think it was incumbent upon them.)

Kennedy v. *Green*, 3 My. & K., 699
Knight v. *Bowyer*, 4 DeG. & Jo., 421
Boursot v. *Savage*, L.R., 2 Eq., 134.

As to *laches* and acquiescence—

The Lindsay Petroleum Co. v. *Hurd*, L.R., 5 Privy Council, 221
Tobin v. *The Queen*, 16 C.B., N.S., 310.

The mortgage having been executed in blank was invalid.

Tayler v. *The Great Indian Railway Co.*, 4 DeG. & J., 559
Brady v. *Brady (ubi. sup.)*

shows that the mortgage fell with the security. (STOW, J.—Now I find that that case is against you, for the certificate there seems to have been issued in the name of a dead man, and was therefore a nullity.) The 40th sec. of the Real Property Act did not bind the Crown, but protects titles derived from the Crown, and leaves untouched the title of the Crown itself. The Land Acts amounted to an implied repeal of Sec. 126 of the Real Property Act; and it was a legal fraud not to make enquiries—Sec. 114. (STOW, J.—But that very section shows that all the old doctrine as to making enquiries is swept away by the Real Property Act, and properly so too. Actual knowledge is a very different thing to constructive notice. Besides, O'Sullivan had a document obtained from the Crown which under Section 100 of the Act served the same as a land grant. It is useless to argue that they were bound to make enquiries when the Act says no.) An objection has been taken by *Mr. Symon* on behalf of the defendants Clark, that the answers of O'Sullivan and Manning could not be used as evidence against his clients, but I submit that they can under the Equity rule 8, ch· 14, p. 201.

Symon, for the defendants, the Messrs. Clark.—That rule merely refers to procedure and as to the time for tendering the answer in evidence, assuming it to be evidence—the objection is not that it was not competent to tender at that particular time, but that when tendered it could not be admitted unless it was evidence. The evidence being taken orally, the answers were merely tendered as admissions and not put in as in strictness evidence. Answers might be tendered in evidence, but according to the practice they were taken as admissions.

STOW, J.—They are evidence in the cause, and the time to object to particular passages is when counsel comments upon the evidence.

R. G. Moore followed on behalf of the Crown, and cited

Travell v. *Carteret*, 3 Lev., 135
Rex v. *Butler*, 3 Lev., 220
Earl of Shrewsbury's case, Buls., 10
Chitty on Prerogative, 397
Chambers v. *Mason*, Yelv., 48
Rendall v. *Crystal Palace Co.*, 4 K. & J., 326
The King v. *Ponsonby*, 1 Ves. jun., 1
4 Com. Digest, 375
In re Bateman's Trust, L.R., 15 Eq., 355
Smith v. *Bewes*, 2 S.A.L.R., 149
Broom's Legal Maxims (5th ed.), 62
Lord Canterbury v. *Attorney-General*, 1 Phill., 322.

H. F. Downer (for the defendant O'Sullivan).—There was no fraud as to residence or improvements, because the Government knew of the circumstances, and (2) there was no fraud in the arrangement with Manning, because it did not amount to an assignment. Manning only agreed with O'Sullivan to perform certain services for him on the land, and O'Sullivan agreed to transfer the land when he should be in a position to do so. (STOW, J.—It might not be an absolute transfer of the agreement, but I can't conceive of anything which could more completely transfer the benefits under the agreement).

Barton v. *Muir*, L.R., 6 Privy Council, 134.

O'Sullivan in no way transferred the rights under the agreement. The Act and the agreement itself prohibited any transfer. But the fact was that Manning in this matter was to perform all lawful conditions to enable O'Sullivan to obtain his grant. (STOW, J.—The agreement does not say "lawful," but expressly alienates the land and promises to transfer.) But even supposing the agreement to be a fraud, it is only a fraud for the purposes and within the meaning of the Act creating it. It is not a fraud within the meaning of the Real Property Act such as would justify the Court in cancelling the land grant. Moreover, even if there has been a fraud committed under the Act the Crown have waived that fraud by their conduct—

Attorney-General v. *Ettershank*, L.R., 6 Privy Council, 354
Bridges v. *Longman*, 24 Beavan, 27.

A selector's agreement is not void, but voidable under Sec. 19, Act No. 14 of 1868-9, and Regulations 45 and 58, and on payment of the purchase-money the Crown had no other option than to issue the grant. (STOW, J.—At present I am inclined to think that if before the grant was issued the officers of the department knew that the conditions of the agreement had not been carried out, that might be regarded as a waiver.) The section under which the grant is to be made is the 16th, and the policy of the Act is to ascertain before a grant is to be issued whether the conditions have been fulfilled. (STOW, J.—If the agreement which renders the original selector's agreement liable to forfeiture was unknown to the Crown until after the grant was issued, then the concealment of it from the officers of the Crown prevented them from asking the Governor to revoke it. Your argument goes to this, that if a man hide the facts until after the issue of the grant he may turn round and say it was the fault of the officers of the Crown that they did not discover the fraud.) I maintain the Crown was not deceived: but even if it had been deceived, the officers of the Crown ought to have proceeded under the provisions of the 19th section of the Act and revoked the agreement. The Act provides a tribunal to consider questions of breaches of the conditions of the agreement, and their decision is final—

Curtis on Patents, 351.

(STOW, J.—There it was a judicial decision; here it is ministerial.)

Emery v. *Barkley*, 8 N.S.W. Reports, 374.

The Crown has no power to recal a grant if derivative interest depends on it—Section 13, referring to the effect of the Real Property Act, 1861. (STOW, J.—There is nothing in that Act referring expressly to the Crown, and you would have to show express words or implication to prove your argument.) Then the Crown having received the purchase-money from O'Sullivan must

return it if they wish to cancel the grant. They cannot approbate and reprobate this transaction—they could not both retain the money and cancel the grant—

Mason v. *Gardner*, 4 Brown's C. C., 436.

Symon and *Nesbit*, for the defendants Messrs. Clark.—It has been sought to impute to the mortgagees knowledge of the alleged frauds, and argued that if the grant fell the mortgage must fall with it. (STOW, J.—What is alleged is that Kingsborough knew the conditions had not been fulfilled. If that would be fatal to the grant, the Messrs. Clark might be bound by Kingsborough's knowledge; but according to the evidence it appears that neither they nor Kingsborough knew anything at all about it. I may say at once that the cases on their being bound to make enquiries appear to be wholly inapplicable.) In the course of the argument the ground taken by the Crown has been very much narrowed. All that remains with regard to O'Sullivan is the effect of the agreement with Manning, and as to the Clarks, the effect of setting aside the grant, supposing that were done. With regard to Manning's agreement—1, the Government must be taken to have known of it; and 2, if they did not know of it, although a fraud under the Act, it was no ground for cancelling the grant; and 3, under the circumstances of this case it could not be set aside on the ground of fraud or mistake. *Mr. Boucaut* had said in his opening that the Commissioner knew nothing leading to a suspicion of the existence of these frauds; but—— (STOW, J.—It appears to me that there must be full knowledge.) I submit that that would not be necessary, taking it as between subject and subject and not as regards the Crown. All this machinery the Act has provided for the very purpose of ascertaining whether or not there has been any breach or non-fulfilment of the conditions. The Crown knew of O'Sullivan's non-residence and of the residence of another person; in fact, they knew that O'Sullivan had not been residing there at all. (STOW, J.—They waived that, you say.) But the fact of their knowing of the violation prior to issuing the grant ought to have put them on their guard. They ought to have made enquiries as provided by

the machinery of the Act, and had they done so they would have discovered this agreement between Manning and O'Sullivan. (STOW, J.—I fail to see that it was incumbent on the Crown to make such enquiries. The machinery of the Act is provided more to assist in the detection of fraud.) The Crown knew in this case O'Sullivan was not residing on the land. He was at least 140 miles away. It was incumbent on the Crown to make enquiries as to who was the person in possession. (STOW, J.—It seems to me clear that the Crown had not actual knowledge. Of course there are cases of constructive notice of equities binding the purchaser, but this is a different case altogether.) The Crown's knowledge was the knowledge of Manning's possession, and so knowledge of his title to possession, viz., the illegal agreement. (STOW, J.—Can you show me a case in which it has been held that where fraud was committed and the grant obtained thereby mere constructive notice was sufficient to show a waiver?) If the Crown knew of another person being in possession they had notice of a fraudulent title attempted to be given by the applicant for the grant. (STOW, J.—I cannot conceive that position being sustained. It seems to me against every principle.) During the currency of the agreement there was a power of revocation confided in a particular tribunal, and at the expiration of the agreement or when the selector applied for his grant he paid his purchase-money on the certificate of the Commissioner that he was entitled to his grant. (Regulation 54.) The substantive part of the 16th section of the Act 1868-9 entitled the selector to his grant on payment of the purchase-money, and there was a proviso making it a condition precedent that he should have fulfilled the conditions of the agreement, of which the Commissioner was constituted the judge. (STOW, J.—That is merely a departmental regulation and cannot affect the law on the subject. You say the Commissioner is a tribunal?) Yes; he exercises judicial functions. The power is wide enough. (Sec. 23.) The policy of the Act is that once a grant is issued, the title, except in a case of actual fraud at the time it is obtained, is good. So far as the agreement itself is concerned it could not be put higher for the Crown than the declaration upon which O'Sullivan applied to complete. Supposing an ordinary case of right to purchase depending upon the lessee

not committing any breach, and he commits a breach, and the lessor without knowledge of it gives a conveyance, then it might be said that the deed might be set aside for mistake or on the ground of fraud, but that would not be done to the prejudice of persons acting innocently on the faith of such a conveyance. And here it is altogether inequitable for the Crown now to seek to deprive the Messrs. Clark of their security after having allowed O'Sullivan to complete notwithstanding their knowledge of his non-compliance with the residence condition—

Emery v. *Barclay (ubi sup.)*

I put it that the Commissioner is bound to make investigation. (STOW, J.—I can see no obligation on him to do so.) The cases which have been cited do not apply to the cancellation by the Crown of a grant, such as the one in question. That point affects the case both as regards O'Sullivan and the Clarks. There is no Common Law right in the Crown to revoke the grant. In ancient times all grants and demises had to be by letters patent containing recitals of every fact which was thought desirable the Crown should know, and which constituted the ground of the grant. In these recitals the utmost technical accuracy had to be observed, and for certain mistakes or misstatements therein the Crown could revoke—

Platt on Leases, v. 1, pp. 230-2
Gledstones v. *Earl of Sandwich*, 12 L.J., N.S., C.P., 41
Comyn's Digest, vol. 4, 420-428.

The principle is that grants are void where third persons are injured by the grant for the honour of the King, and void as to the King if he was deceived either in the consideration or in the equity of the estate; and the matters in respect of which the deceit was charged always appeared on the face of the grant. When they did not appear on the face of the grant the argument that derivative title fell with it did not apply. In this case the estate was intended to pass; there was an alienation in fee. Mr. Kingsborough merely performed the ministerial act of registration,

which of itself was not sufficient to constitute him the mortgagee's agent so as to affect them with any notice he might have had—

Wyllie v. *Pollen*, 32 L.J., Ch., 782.

(STOW, J.—I am with you on the point that neither Kingsborough nor the Clarks knew anything which could affect them.) The Treasury receipt was a voucher, so far as they were concerned, that everything was regular and in order. Acting innocently they had a right to assume that the Government would not receive money if there was anything to prevent the selector from obtaining his grant. It is well established that the policy of the law is in favour of security of title for the public good—

Story's Equity Jurisprudence, sec. 381.

The Government had no right to insist that the interest of those mortgagees should not be protected, and ask a decree from the Court declaring that they were not entitled to any benefit whatever under a document which the Government themselves issued. As between subject and subject the law is perfectly clear that innocent persons in the position of the Clarks should be protected. We could not cite a stronger authority in our favour than the case quoted by *Mr. Boucaut*—

Hunter v. *Walters.*

(STOW, J.—What protection do you say your clients should have?) The Crown should have offered to repay the amount due on the mortgage, they to stand in our position as regards O'Sullivan, and recoup themselves from him. (STOW, J.—Well, that seems to be fair and reasonable. What would be the form of the decree?) Assuming your Honor should decide that the grant must be set aside as regards O'Sullivan, the decree would be that that should be done on payment by the Government of the amount due to the Messrs. Clark, and order repayment to the Government by O'Sullivan of the difference between the purchase-money paid by him to the Treasurer and the amount paid to Messrs. Clark.

STOW, J.—What do you say to that, *Mr. Barlow?*

Barlow.—I shall take an opportunity of submitting the suggestion to my clients.

STOW, J.—I think that Messrs. Clark should be paid their costs, as there is no imputation against them or Mr. Kingsborough.

On the resumption of the Court on Monday, 3rd December,

Boucaut, Q.C.—The Crown is anxious to pay every deference to your Honor's suggestion, and accede to it except as to paying the Messrs. Clark's costs, which they decline to do unless the value of the selection enables them.

STOW, J.—Then the case must go on. I think, however, you had better pay their costs absolutely. When a *scire facias* is issued for the purpose of cancelling a Crown patent, everything falls with the patent; but when the Crown comes into a Court of Equity, the Crown must do equity. If the Crown choose to let that grant stand, it is not void; according to your own showing it is only voidable. It strikes me that this having been hidden from them, and the Crown having been thereby prevented from appointing a tribunal, it would appear that they have a right to come into a Court of Equity and say "This ought to be cancelled;" but then the man has paid £317, and you can't say "We will have the land and the money too." It would be most inequitable to allow the Crown to have both. It appears that the Clarks were innocent mortgagees, having no notice; yet you come and ask to cancel the grant and set aside their claim. Unless you succeed on prerogative, showing that all derivative titles go with the cancelling of the grant, it strikes me that the Clarks should not be included in the information. Unless you succeed on the prerogative point the bill will have to be dismissed as against all parties, because you have not offered to pay the money to O'Sullivan.

The bill was then amended by the Crown offering to pay to the Clarks the mortgage-money and interest, and offering to pay £317

to O'Sullivan, with interest at the same rate as on the mortgage, allowing the same in account as against the mortgage-money paid to the Clarks.

Wigley, for the defendant Manning, was then heard on the question of costs. The defendant Manning comes under the 12th rule of the Equity Act, chap. 30, page 221; no relief being prayed against him whatever; discovery only being required of him—

40 Chancery Order, rule 16
1 Smith's Ch. Practice (7th ed.), 374
Morgan on Costs, pp. 84, 150, 151
Atwell v. *Small*, 6 Cl. and F., 232
De Combe v. *De Combe*, 3 Jurist, N.S., 712
Cockell v. *Taylor*, 15 Beav., 103
Attorney-General v. *Burch and Others*, 4 Madd. R., 178
Williams v. *Williams*, 2 Brown's C. C., 86.

The defendant Manning does not come within any ground of demurrer, and therefore the 12th rule of the Equity Act would not clash with the 38th clause of the Act—

Bush v. *Trowbridge Waterworks Company*, 10 L.R., Ch. 459.

At all events he should be allowed costs for putting in his answer as well as costs of the day during the hearing—

Godfrey v. *Tucker*, 9 Jurist, N.S., 1188.

Barlow.—The fact of the bill being demurrable does not excuse the defendants from payment of costs. The English decision quoted by *Mr. Wigley* rested on the absence in England of any such section as that contained in the Equity Act here; but the matter there was left substantially to the discretion of the Judges of the Court and the practice of the Court, whereas here the Judges were controlled by an absolute enactment of the Legislature (38th section of Equity Act.)

Cur. ad. vult.

1 April, 1878—

His HONOR having intimated his desire to hear counsel for defendant Manning as to whether he should have been made a party to the suit,

Belt and *Wigley*, for Manning.—Manning was simply in possession of the property, and had only paid the second instalment of interest, amounting to £1 14s. There was no other case made out against him. There was no charge of fraud. In fact, if fraud was committed it was committed against him, and not by him against the Crown. (STOW, J.—One point is whether it was right to put him on the record in order to bind his interest or an alleged interest under his agreement with O'Sullivan.) There is no charge made against him in reference to this agreement. The agreement is set out as a ground on which O'Sullivan has forfeited his interest. Only in the 8th and 11th paragraphs of the bill are there any charges against Manning. (STOW, J.—They set out the agreement in terms, and one part of the agreement is that O'Sullivan is to convey his interest to him directly he gets it granted.) Then Manning has no estate whatever under this agreement. (STOW, J.—There are facts that show fraud on his part as well as that of O'Sullivan. Both of them are parties to the fraud against the Act.) There is no doubt an attempt to transfer O'Sullivan's interest to Manning, but then the latter has no interest within this agreement. (STOW, J.—There is no need to use the word fraud if the facts show fraud. But at present I must say I do not see there is any case against Manning merely as regards the charge of fraud. The reason I think so is because he would then only be liable for costs, and they are not prayed against him. All the authorities show that relief must be prayed. There must be positive prayer in such a case, and that is not here. The question now is as to his title, whether it ought to be bound.) If the grant falls he can have no right or interest in the land. This falls within the class of cases which are referred to in Story on Pleadings; where there is a possessive right or right of lesseeship it is not necessary to make the occupier or tenant a party—

Story on Pleadings, 4th ed., sec. 151, p. 195.

If the plaintiff succeed in annulling the land grant, Manning's title falls; but in any case his title falls, for he is not registered as the proprietor or as holding any interest whatever in the land, and the Real Property Act requires that to be done. Besides, O'Sullivan has got the land grant and mortgaged the property. (STOW, J.—There is an interest in him beyond the mortgage; there is the equity of redemption. If this argument had been good Manning would have had the right to compel O'Sullivan to convey his estate or interest, and in fact make good to him the agreement.) But the other view is that Manning has no interest in it. If they had put it the other way so as to assert that he had an interest they would in fact be both approbating and reprobating. The suit, we contend, can go on and the Court can give a full and complete decree without making him a party. (STOW, J.—Suppose a person was induced to make a conveyance by fraud, giving notice of the fraud to the person obtaining the conveyance, and he wished to set it aside, and the second person had entered into an agreement with a third person for the sale of the property, would it not be necessary to make him a party? In the bill it would have to be asserted, or the facts would disclose that he was bound by the notice, and that the agreement was altogether invalid as against the plaintiff.) The very contract entered into by the Government precludes O'Sullivan from dealing with the property in any manner. Then Manning is entitled at all events to such costs as would be granted on a demurrer—

Godfrey v. *Tucker* (*ubi supra*).

Boucaut, Q.C., in reply.—There are two questions upon which the plaintiff was justified in making Manning a party:—1, on the ground of fraud in the agreement which was the root of the bill; and 2, on the ground of his title. With regard to the question of bringing parties before the Court, they would be liable to costs providing the prayer asked for such costs; and a general prayer for costs was sufficient, for the Court would do what was right in respect of that prayer. But the substance of the real reason for bringing Manning before the Court was his interest in the land under the agreement. His learned friend begged the question in

his argument when he said the Crown would get rid of Manning if the grant fell. If the grant was good he had an interest, or if the agreement was good he had an interest. The section in Story quoted by *Mr. Belt* was altogether in favour of the Crown. Although the proposition was right as to a legal title, where it was an equitable title a person in the position of Manning might be made a party—

Story on Pleadings, note to sec. 76, C
Mitford on Pleadings, 5th ed., p. 190
Daniels, 1, p. 191
Aberaman Iron Company v. *Wickens*, L.R., 4 Chan., 101
Dixon v. *Parker*, 2 Vesey, sen., 219.

Cur. ad. vult.

16 September, 1878—

His Honor the CHIEF JUSTICE now read the minutes of decree of His Honor Mr. Justice STOW, who was absent through illness :— On the application of the informant, all other parties consenting, let the informant have liberty to amend the information—By striking out all allegations tending solely to show the claim for relief against the defendants the Clarks; by offering to do equity by payment or allowance of the moneys paid (£317), and such interest as shall be just, by the defendants to O'Sullivan; by offering to affirm the mortgage to the Clarks, or at once to redeem the same; by charging that the defendant O'Sullivan ought to indemnify Her Majesty against the said mortgage, or pay the same and interest; by adding to the first paragraph of the prayer the words—"On payment or allowance of the sum of £317, with such interest as may be just;" by striking out the second and third paragraphs and substituting therefor the following paragraph :— "2. That it may be decreed that defendant O'Sullivan shall indemnify Her Majesty against the said mortgage and all loss that may be occasioned thereby, or that he shall pay or allow to Her Majesty the mortgage-money and interest." Five guineas costs of amendment to be allowed to the defendant O'Sullivan, and a

similar other sum to the defendants the Messieurs Clark. And thereupon decree that the information be dismissed as against the defendant Manning, without costs, but without prejudice to the rights of the Crown, and be dismissed as against the defendants the Messieurs Clark, with costs to be paid by Her Majesty. Declare that the land grant was obtained by fraud of the defendant O'Sullivan; and on payment or allowance of the sum of £317 and interest by the Crown to the defendant O'Sullivan, O'Sullivan shall do and concur in all acts that may be necessary to vest the section of land in Her Majesty, or in a nominee of the Attorney-General. Injunction to restrain O'Sullivan from dealing, &c., in the meantime. An enquiry to be made of what would be a proper sum to indemnify the Crown against the mortgage. An enquiry to be made as to the balance due from the defendant O'Sullivan to the Crown or from the Crown to him. Interest to be allowed on the £317 at £7 per cent. per annum, and whatever shall be due on taking the accounts is to be paid by or to the Crown or O'Sullivan respectively. O'Sullivan to pay costs of suit, including costs of transfers and the discharge of the mortgage, except such as have been occasioned by the joining of the defendants the Clarks. The Crown to pay to the defendant O'Sullivan such costs as have been occasioned by the joining of the Messieurs Clark as defendants. Liberty to apply.

WAY, C.J., GWYNNE, J., BOUCAUT, J.] [COMMON LAW.

23 JULY AND 7 OCTOBER, 1878.

MOORHOUSE AND ANOTHER v. GLEESON AND ANOTHER AND BOUNDY AND ANOTHER.

INTERPLEADER.—Sale-note—Bill of Sale—Registration—Bona Fides—*Possession.*

The claimants on the 29th November, 1877, purchased from the execution debtors three horses for £40, paying £10 in cash, and the balance on the 12th December following, the horses to be delivered on the following day.

An ordinary sale-note was drawn up and signed.

The claimants did not obtain delivery of the horses, although, as they alleged, they had made every effort to do so, until shortly before judgment obtained by the execution debtors, who seized the horses in question.

Held—*That the sale was valid, and that the right of possession, the possession, and the property in the goods were in the claimants at the time of seizure.*

That the sale-note did not require registration as a bill of sale.

RULE to set aside the verdict and for a new trial, or to enter judgment for the claimants.

The action was interpleader, tried in the Local Court of Clare of Full Jurisdiction. Messrs. Moorhouse & Co. claimed three horses which had been seized in execution by Messrs. Gleeson and Co. in an action against Messrs. Boundy. The claimants relied on a sale-note dated November 29, 1877, given by one of the Messrs. Boundy to Messrs. Moorhouse & Co. in consideration of £10 then paid and of the sum of £30 agreed to be subsequently paid. The horses were to be delivered next day. Messrs. Moorhouse & Co. paid the £30 on December 12, and knew at that time that the horses had not been delivered, and they did not get possession till March 12, 1878, being a few days after they had received intimation from Messrs. Gleeson & Co. that they were suing Messrs. Boundy for debt.

It was alleged by the claimants that during the interval between

November 29 and March 12 they had made every effort to get possession of the horses. The Court found a verdict for the execution creditors.

Emerson, having on the 23rd July obtained a rule *nisi*, now moved that the same be made absolute. On motion for the rule the following cases were cited—

Graham v. *Wilcockson*, 35 L.T.N.S., 601
Cherry v. *Fuller*, 8 S.A.L.R., 113.

Kingston showed cause.—The sale on which the claimants rely was fraudulent, not being a *bona fide* sale within the meaning of the Statute 13 Elizabeth, chapter 5. And further, the document on which the claimants rely was void, because it had not been registered as required by the Act. (WAY, C.J.—That was decided against you by this Court in the case of

Tyrie v. *Warren* (unreported).

However you have to deal with the first point.) A wagon and three horses changed hands for the sum of £40. There was no evidence to show that the party selling had any authority to bind his co-owner. The only money that passed immediately was £10, and it was suggested that there was an arrangement for the payment of the balance of £30. This transaction took place on November 29, and according to the claimants' case the horses were to be delivered the next day, but no delivery was made till months afterwards, viz., on March 12. The claimants were aware of the non-delivery when the £30 (the balance of the £40) was paid, which was on December 12, and yet alleged they had made every effort to get the horses. As soon, however, as they heard that Gleeson had signed judgment they had little difficulty in gaining possession, for a few days later (on March 12) the horses were seized. (GWYNNE, J.—Trover would have lain against the sellers. It appears that the claimants got possession of the horses some days before the seizure.) The question of *bona fides* within the meaning of the statute was one of fact, and the Court below were the absolute judges in that respect, and they had

decided in favour of the execution creditors. When an alleged out-and-out sale, as in this case, entitled the purchaser to immediate possession, and the vendor was found in possession at a subsequent date, it raised the very strongest presumption of fraud, and therefore there was ample evidence to justify the Court in finding this a fraudulent sale. (GWYNNE, J.—Do you deny that the consideration money was paid?) Not at all. This sale was fraudulent inasmuch as there must have been some understanding between the claimants and the Messrs. Boundy entitling them to retain possession of the horses. (WAY, C.J.—But that is rebutted by the evidence. Two witnesses show that it was an out-and-out sale, and there is nothing to contradict it. One of the witnesses who proved this was called on the side of the execution creditors.) When an out-and-out sale is alleged and possession does not follow, and there is nothing to explain it, it is conclusive evidence of fraud.—(GWYNNE, J.—No; but it is an element.)

Twyne's case, I. Smith's Leading Cases 1, and the cases there referred to.

(GWYNNE, J.—The great principle in these cases is that where possession is not consistent with the contract therefore it constitutes an element of fraud, and no doubt it is so, but here possession was not to be taken immediately, but on a subsequently named day.)

Emerson was not called on in reply.

WAY, C.J.—It appears to me that the evidence is all one way. If there had been evidence that the property remained in possession of the vendor, with consent of the purchaser, there might have been something in the argument in support of the finding of the Court below, but I cannot understand on what ground the Magistrates arrived at their conclusion.

GWYNNE, J.—I am of the same opinion. It seems to me from the contract that the property passed and the right of possession. That right was reduced into possession by taking the horses before the execution creditors seized them; and there is no evidence of fraud.

BOUCAUT, J.—I have no doubt whatever on the point, as mentioned by my learned colleague Mr. Justice Gwynne. There is no doubt in my mind that the property passed, and the right of possession. The only matter I have any doubt about is as to the point being taken in the Court below. But I think that, under circumstances where it appears abundantly clear to the counsel engaged for the claimants that the facts and the law are both in his favour, he is justified in saying to the Court "for these reasons I will not trouble you."

Rule absolute for the claimants with costs.

7 OCTOBER, 1878.

THE CORPORATION OF GLENELG v. THE WEST TORRENS DISTRICT COUNCIL.

MUNICIPAL CORPORATIONS ACT, 11 *of* 1849.—*District Councils Act, No.* 16 *of* 1852—*Act No.* 5 *of* 1855-6—*Proclamation—Extension of boundary*—Ultra Vires.

The Governor has no power under Act No. 5 *of* 1855-6, *on petition, to add to the lands of a Municipal Corporation land already included in the boundaries of an existing District Council.*

SPECIAL CASE.

The action was trespass brought by the Corporation of the town of Glenelg against theDistrict Council of West Torrens for removing in September, 1875, a boundary-post erected by the plaintiffs on a road claimed to be within the municipal boundaries of Glenelg, and for erecting on another part of the said road a boundary-post of the defendants'. In July, 1853, the District Council of West Torrens was duly proclaimed under Act 16 of 1852, and the boundaries set out in the proclamation included the piece of land in question. In August, 1855, the Corporation of Glenelg was also duly proclaimed by the then Governor by virtue of the powers vested in him by Act 11 of 1849; and in February, 1857, the Corporation, under and by virtue of Act 5 of 1855-6, presented a petition to His Excellency—"That in order to obviate the objection raised to the male sex bathing in the sea along the line of coast fronting the town of Glenelg, and which line of coast has been appropriated to bathing for females, it has been considered advisable by the inhabitants and ratepayers . . . . . to erect a footbridge across the creek at Glenelg for the accommodation of the bathers. . . . . That it is proposed the said bridge shall cross the creek near Canning Street, in Glenelg, to the road on the other side not within the jurisdiction of the said Council. That by the fourth clause of the Act 5 of 1855-6 your Excellency is empowered, with the advice of the Executive Council, to add new land to existing Corporations. Your petitioners there-

fore humbly pray that your Excellency . . . . will . . . cause the road on the east of Section 203, District A, commencing at a point in a line with the north boundary of Section 184, District A, and extending south round the point of Section 203, and west along the said section to a point in a line with the said starting-point . . . . to be proclaimed within the jurisdiction of the said Municipal Council for Glenelg," &c. The memorial was advertised in the *Government Gazette*, and then a notice was inserted in the *Gazette* by the Chief Secretary stating that it was the Governor's intention to make the addition prayed for "three weeks after date." In due course the addition was proclaimed, and the bridge was erected by the Corporation with the consent of the defendants. The plaintiffs erected the boundary-post on the road at the north-west corner of the said land immediately after the proclamation, and it remained there until removed by the defendants in September, 1875. The question for the opinion of the Court was, whether, under the circumstances set out in this case, the said proclamation was valid, and whether the land and roads therein mentioned were thereby legally severed from the defendants' district and added to the plaintiffs' Corporation. If the Court should be of opinion that such proclamation was valid, then a verdict was to be entered for the plaintiffs for nominal damages and costs of suit; if otherwise, then the verdict to be for the defendants with costs.

Symon and *Wigley*, for the Corporation of Glenelg, the plaintiffs.—The Act under which the Corporation was established, No. 11 of 1849, Sec. 130, provides that a proclamation shall proceed upon petition by a majority of two-thirds of the residents and householders in the district sought to be incorporated. Then comes the Act No. 5 of 1855-6, extending and liberalizing the provisions of the old Act, and Sec. 4 of Act No. 5 gives power to the Governor, acting under the advice of the Executive Council, to include by proclamation additional lands within the limits of a Corporation. The Governor exercises judicial functions, and it is for him to say when petitioned—as in the present case—whether it is a reasonable thing to make the addition or not. The new Municipal Corporations Act of 1861, Sec. 217, shows the very extensive powers given

to the Governor to alter the boundaries of the different Corporations—"May extend the original limits of any Corporation, town, district, or place by the addition thereto of any land."

Mann, Q.C., and *Downer, Q.C.*, for the District Council of West Torrens, the defendants, were not called on.

GWYNNE, J.—The only point I have to decide is the validity of the proclamation in question. It is supported by reference to the fourth section of Act No. 5 of 1855-6, but there is a parallel enactment in the District Councils Act, No. 16 of 1852. There are parallel lines of legislation for Corporations and for District Councils, and by parity of reasoning, if the Governor might take land from a District Council and give it to a Corporation, he might take from a Corporation and give to a District Council. Suppose this had been an attempt by one District Council to take part of the land of another District Council, a parallel question would arise under this Act. Had this been a question between district and district it would be regulated by that Act, but this could not be regulated by that Act, because it was not a contention between district and district, but between a Corporation and a district. Even supposing there was power for one district to take part of another district, and power for one Corporation to take part of the land of another Corporation, still it would not follow that a Corporation might take part of a District Council. There is no doubt of this land being a fixed part of the District of West Torrens, and it appears to me it was *ultra vires* for the Governor under any circumstances to separate it from that district and add it to the Corporation of Glenelg. Therefore I decide—1st, that the Governor was not moved under proper petition; and 2nd, that he had not the power to add appropriated land either as to a Corporation or a district. In my opinion the proclamation was invalid.

Case answered in favour of the defendants, with costs.

8 AND 22 OCTOBER, 1878.

IN THE MATTER OF THE MUNICIPAL CORPORATIONS ACT, 1861, AND IN THE MATTER OF THE CORPORATION OF THE TOWN OF GOOLWA.

MUNICIPAL CORPORATIONS ACT, 1861, *Secs.* 167 *and* 172.—*Notice of Rates—Owner or Tenant in possession.*

Under Sec. 167 *of the Municipal Corporations Act*, 1861, *it is not necessary to leave with the owner of vacant land particulars of the rates to be collected in respect thereof; that section only applying where there is some person in possession either as owner or tenant.*

PETITION of the Corporation of the Town of Goolwa under the Municipal Corporations Act, No. 16 of 1861, for an order for the sale of Sections 125 and 196 in the township of Goolwa, for payment of arrears of rates. The owner, Mr. G. D. Sismey, had been absent from the colony for many years, Mr. Rymill, of Adelaide, being his attorney. The land was unoccupied, and no particulars of the rates to be collected had been served on any person.

J. E. Moulden, for the petitioners.—The District Councils Act, No. 43 of 1876, Sec. 148, is analogous to the Municipal Corporations Act, and settles the question of jurisdiction. Also

In re Glanville District Council *ex parte* John Hindmarsh, 8 S.A.L.R., 255.

If land be in possession, then there is an easy mode of obtaining payment of rates, viz., by serving notice under the 167th section of the Act, and by procedure at law, when execution may be levied or distress made. But, if vacant or unoccupied, then the 172nd section comes in, and under that section this petition is brought. If Section 167 be read with the 172nd section it will be found to mean the owner in possession or the tenant in possession, because notice is to be served in the town, and no other mode is provided. The 205th section describes the mode in which service is to be made. Sismey, the owner, has been absent from the colony prior

to, and since 1872, when the rate was declared. Therefore that notice could not have been given, and it was not the intention of the Act that owners of property who were resident out of the town or neighbourhood where that property was situate should be served with such notice. Sec. 205 provides for the only manner in which notice should be served.

Belt, for Sismey.—The Collector of the Corporation ought to have served particulars on Sismey personally, or posted them to him, or to his agent. The requirements of the Act have not been complied with (see Section 167). Without that notice in the first instance, all the proceedings were foundationless. The 205th clause defines personal service, but no service was shown in this case under the 167th clause; notice might, however, have been sent by post or otherwise to Sismey or to his agent Rymill. Unless some notice was given to the owner of the rate being made he could not know the amount or to whom the money was to be paid, and he might be sued, or his goods distrained upon, or the land itself actually sold without his knowledge or any opportunity being afforded him of liquidating the rates.

Moulden, in reply.

Cur. ad. vult.

22 October—

GWYNNE, P.J., now delivered judgment herein as follows:—The Corporation of Goolwa petitioned for the sale of certain lands in their jurisdiction (the reputed owner of which was George Dean Sismey, who was not resident in the province), to satisfy certain arrears of rates due on the property. The principal point urged by *Mr. Belt* for the respondent was that the provisions of the 167th section of the Act as to supplying particulars of the rates have not been complied with. It is not pretended on the part of the petitioner that any such particulars of the rate have been left in any manner with the owner of the land or with his agent. Mr. Sismey, although not now resident in the province, is a gentleman very well known and highly respected, and Mr. Rymill acts as his

attorney. It was urged that notice of the arrears of rate might have been served on Mr. Rymill or application made to him for payment. But the law is not merely to be complied with; it is to be helped as well. This will be seen from the fact that a person is not regarded as a full citizen, and cannot exercise all the privileges or enjoy the benefits of full citizenship, until he has first qualified himself by having his name put on the citizens' roll. From that roll are made the assessments, and it is necessary that the authorities should be helped, the principle being that assistance should be given to them. The labour is not to be all on the one side; there is to be a reciprocity in carrying out the laws. Thus there is laid down the great principle that every one is supposed to know the law, and, if a non-resident hold land here, he must be taken as knowing the law on landed property in South Australia. If he does not know it, he must suffer the consequences. But the great point relied upon by *Mr. Belt* was that no one was served with particulars of the rates due, as required by the 167th Section. Mr. Sismey was in England, and had been there even before Goolwa became a Corporation; but it was urged that some one, either the owner or the person acting for him, ought first to have been supplied with these particulars. Now it appears to me that the section in question only applies when the owner or tenant is in possession. It is not like the provision made in the Lands Clauses Act, where, if personal service cannot be effected, a substitute is provided by posting up a notice in some conspicuous public place. Here the language of the clause does not require that. Service is to be made on the owner or tenant in possession, but in the present case the premises have never been occupied, and Mr. Sismey was away in England. Therefore, under these circumstances, it was impossible to comply with this clause. If Mr. Sismey were in the colony the remedy would be simple, for then the Corporation might pursue him by action. But as matters stood he could not be sued, nor could there be any distraint, the respondent being absent from the province, and there being no goods to distrain on; and if the Corporation were to be compelled to make personal service before they could seek their remedy, then in similar cases to this nothing would be done at all. I take it that the great object of the Act is to secure payment of rates from persons who

are absent and not approachable, by charging the land with them; and it appears that the Corporation under the circumstances of this case may resort to the 172nd section of the Act, where personal service is not required. So it would appear, subject to the other question as to the power-of-attorney, that the petition should be complied with. *Mr. Belt* has stated that Mr. Rymill had a power-of-attorney from Mr. Sismey to act for him here; but no copy of the power-of-attorney was produced to the Court, nor was any full extract given, and there was no pretence that Mr. Rymill had informed the Corporation that he was possessed of that power. Why did he not come forward and assist the Corporation in making up the citizens' roll? He did nothing. He never stepped forward to say "Hold your hand" till the Corporation was just on the point of disposing of the property. I have had some difficulty in interpreting the meaning of the Act on this question, but I think the construction I have put on it is a sound one. I shall therefore make the order in terms of the petition.

Order for sale accordingly.

6 NOVEMBER, 1878.

REID v. REID AND CLARK.

MATRIMONIAL CAUSES ACT.—Wife's Costs.

A wife who is unsuccessful in a matrimonial suit, whether as petitioner or respondent, is not entitled to have her costs of and incidental to the hearing taxed as against the husband.

APPLICATION, pursuant to leave reserved at the trial, to have wife's costs of and incidental to the hearing taxed as against the husband.

The suit was for a judicial separation, and the usual issues had been tried by a jury, and found in favour of the husband.

Smith, for the applicant the respondent, cited
Brown (2nd ed.), 276
Flower v. *Flower*, L.R., 3 P. & M, 132.

Downer, Q.C., for the petitioner.—The principle which rules in the Court is that up to the hearing the wife may tax her costs, but if unsuccessful, either as the petitioner or respondent in the hearing, her husband is not liable for her costs at the hearing. The rule in England is the same as the rule here. The proctor should make application for his client's costs, if he cannot proceed without them, when the Judge takes his seat on the Bench and the jury are sworn—

Brown (2nd ed.), 276, citing *Keats* v. *Keats* and *Another*, 1 Sw. & Tr., 358
Somerville v. *Somerville*, 36 L.J., P. & M., 87
Rules 134-5, *Gough* v. *Gough*, 32 L.J., P. & M., 128.

Smith referred to the English rule 159 as *verbatim* with our own rule 135, and as subsequent to Keats's case.

Per Curiam.—We do not feel justified in going behind the settled practice of the Court, which is that a wife unsuccessful in a matrimonial suit, whether as petitioner or respondent, is not entitled to have her costs of and incidental to the hearing paid by the husband.

Application refused.

WAY, C.J., GWYNNE, J., BOUCAUT, J.] [COMMON LAW.

23 OCTOBER AND 18 NOVEMBER, 1878.

GUNN v. ARMSTRONG.

LIBEL.—Privilege—Malice.

A letter written by the defendant to the plaintiff, under privileged circumstances, stated that the plaintiff had neglected his work for two years; that he was in the power of every shepherd from whom he could borrow money, and was continually going to townships (named), and sold grog right and left in the place.

The letter went on to say that the writer found plaintiff's station too near Booborowie (the station of which defendant was manager), "and the station suffering in consequence of his dishonesty, having taken lucerne seed, sewing twine, and bags from the store, of which I have proof. Mr. Brooks, whom he still owes £100 to, says he paid what interest he did pay by three bags of flour. Of course I can't say where he got the flour."

In an action for libel, the occasion being privileged, and there being no extrinsic evidence of malice,

Held—*That malice could not be inferred from the terms of the letter itself.*

RULE for a nonsuit or a new trial.

The action was libel, contained in the letter set out in the head-note, the damages being laid at £2,000. The plaintiff was overseer, and the defendant manager, of Dr. Browne's Booborowie station.

About January, 1877, there were some private differences between plaintiff and defendant. The former then made up his mind to leave, but was induced by the defendant to remain at an increased salary.

In March the plaintiff obtained leave of absence, and came to Adelaide. On his return to the station some unpleasantness arose between him and defendant, owing to the latter having engaged a nephew of his to do part of plaintiff's work, and it was ultimately arranged that plaintiff should leave the station. Plaintiff then went to a farm of his at Leighton, distant about seven miles from Booborowie.

In the beginning of May he had arranged to take the management of a station of Mr. W. A. Horn's on advantageous terms, but Mr. Horn having seen Mr. Price, the general manager of Dr. Browne, and having seen the letter set out in the head-note, which was written and sent by the defendant to Mr. Price, refused in consequence of that letter to employ the plaintiff.

At the trial the Judge refused to nonsuit, but reserved leave to the defendant to move the Full Court for a nonsuit.

The defendant then called evidence, showing that he had information which, at the time, warranted him in believing the truth of the statements contained in his letter.

The jury found a verdict for the plaintiff for £100 damages.

Mann, Q.C., having on the 23rd October obtained a rule *nisi* for a nonsuit or new trial, citing

Caulfield v. *Whitworth*, 18 L.T.N.S., 527,

Mann, Q.C., and *Downer, Q.C.*, now moved that such rule be made absolute.

Symon and *Jacobs* showed cause, citing—

Fountain v. *Boodle*, 3 Q.B., 11
Jackson v. *Hopperton*, 16 C.B., N.S., 829
Fryer v. *Kinnersly*, 15 C.B., N.S. 429
Addison on Torts (4th ed.), 790
Clark v. *Molyneux*, L.R., 3 C.B.D., 237.

Mann, Q.C., and *Downer, Q.C.*, were not called on.

Per Curiam.—We are unanimously of opinion that the rule should be made absolute for a nonsuit.

Rule absolute for a nonsuit with costs.

GWYNNE, P.J.] EQUITY.

22 AND 25 OCTOBER AND 26 NOVEMBER, 1878.

LOGUE v. NESBIT AND OTHERS.

WILL.— Construction—Marshalling Assets—Annuity Charge—Legacy.

A Testator, after certain specific bequests, bequeathed to his wife an annuity of £300, so long as she should continue his widow, and, in the event of her marrying again, an annuity of £50.

He demised and bequeathed all his real estate (charged in aid of his personal estate with his funeral and testamentary expenses, debts and legacies) and all his residuary personal estate, to Trustees, who were to hold the same, subject to the payment of the said annuity, as to the real property A, subject as aforesaid, in trust for his son George on his becoming of age; as to real property B, subject as aforesaid, in trust for his son William on his becoming of age, and, as to all the rest of his real estate (if any) in trust to sell the same, and divide the proceeds amongst his (testator's) sons living at his death, or born within due time thereafter, if more than one in equal shares, or if only one to pay the same to such one, the share of each son to be paid to him on his becoming of age.

The testator empowered his Trustees to apply such portion as they might think fit of the income of his real estate, or the income or capital of his residuary personal estate, for the improvement or benefit of his real and personal estate, and directed his Trustees to apply the next income of his real or personal estate, in the first place, in payment of the said annuity, in the next place, during the lifetime and widowhood of his wife, to apply such a sum annually as they should think fit for the maintenance, education, or advancement in life of any of his children, during their respective minorities, and to invest the residue, and, subject to the payment of the said annuity, to hold his residuary personal estate, and the investments thereof, and any other moneys which might come to hands of his Trustees from the rental of his real estate, or otherwise, and the investments thereof, in trust to stand possessed of £3000 thereout in trust, (subject as aforesaid) for his son William, on his becoming of age, and to stand possessed of the sum of £1000 a-piece in trust, subject as aforesaid, for each of his (Testator's) daughters; and to invest the said sums of £1000 as therein mentioned, and to pay the income of each such sum of £1000 to each such daughter during her life for her separate use, with a power of appointment to such daughter in favour of her children or more remote issue.

The testator directed his Trustees to divide the residue of his residuary personal estate equally amongst his children share and share alike, each child to receive his share on attaining the age of twenty-one years, if a male, or, if a female, on her attaining that age or marrying.

The testator directed his Trustees, after the death or future marriage of his wife, to apply the whole, or such part as they should think fit, of the net income of his real and personal estate (subject to payment of the said annuity) for or towards the maintenance or education of any of his said children during his or her minority.

There were three daughters of the testator entitled each to £1000 under his will, but his personal estate and the accumulations of his real estate were insufficient to make up the sums of £3000 and £1000 respectively directed to be paid to his son William and to such daughters.

On case stated—

Held—1. *That it was not the intention of the testator that the assets should be marshalled, and the annuity thrown solely on the real estate, but that the annuity must be obtained rateably from both the real and personal estate.*

2. *That the doctrine of marshalling assets did not apply where, as in this instance in case of the son William, it would have the effect of injuring in particular one of the beneficiaries.*

3. *That the costs of the special case should be paid out of the mixed real and personal estate, in the same manner as the annuity.*

SPECIAL case stated under Part VI. of the Equity Act, 1866-7.

Edward Logue, late of Kent Town, brewer, deceased, by his will, dated 11th October, 1864, after certain specific bequests, bequeathed to his wife an annuity of £300, so long as she should continue his widow, she maintaining and educating her children during their respective minorities, and, if she should marry after his death, then he bequeathed to her an annuity of £50 during her life for her sole and separate use, independent of any husband and his debts, control, &c., and he bequeathed all his real estate ("charged in aid of his personal estate with his funeral and testamentary expenses, debts, and legacies") and all his residuary personal estate to the above-mentioned executors, upon trust, that they should, as to his personal estate, as they might think fit, sell or otherwise convert the same into ready money, and invest the moneys so realized, and all other moneys forming part of his residuary estate, in their names, as such trustees, upon real securities in South Australia, or in Government bonds or debentures, holding the same, subject to the aforesaid annuity of £300 or £50, as the case might be, upon

the trusts following:—As to his dwelling-house, brewery, and premises at Kent Town, situate on and comprising Allotments 5, 66, 67, 68, and 69, in trust to convey the same to his son George Edward Logue on his attaining his majority; as to his Allotments 2 and 70, Kent Town, with the buildings thereon, in trust to convey to his son William Henry Logue on his attaining his majority; and, as to all the rest of his real estate, in trust to sell and divide the net proceeds equally between his sons living at his death, or born in due time afterwards, the share of each son to be paid to him on his respectively attaining his majority, the trustees during the interval prior to the real estate being so conveyed or sold, to manage and let on lease the same, excepting the dwelling-house, brewery, and premises situate on the said Allotments 5, 66, 67, 68, and 69, which should be let only from year to year, or upon a lease which should expire on or before his eldest son George should attain his majority; and, subject to the before-mentioned annuity, the trustees should hold his residuary personal estate and the investments thereof, and any moneys derived from the rental of his real estate or otherwise, and the investments thereof, in trust to stand and be possessed thereout of the sum of £3,000 for his son William on his coming of age, and to stand possessed of £1,000 apiece in trust for each of his daughters, and to lay out and invest the said sums of £1,000 in the names of the said trustees in real securities in South Australia, &c., the interest on the same to be paid to them (his daughters) respectively during their natural life for their sole and separate use. Further, that the residue of his said residuary personal estate should be equally divided amongst his children, including his son George, share and share alike, the respective shares of each to be paid to them, as to sons and as to daughters, on their respectively attaining their majority, or previously marrying with the consent of the guardian or guardians for the time being, &c. The testator died on the 30th June, 1865.

The parties beneficially interested under the will when the case was stated were Edward Logue, the plaintiff; Ellen Nesbit, wife of Edward Pariss Nesbit; William Henry Logue, Annie Jane Logue, Louisa Sarah Logue (the three last named being infants) children of the testator; Reginald George Nesbit and Leonard Logue Nesbit,

infants, children of the defendants Edward Pariss Nesbit, and Ellen his wife, and Sarah Logue, the testator's widow.

The personal estate of the testator and the accumulations of the rents and profits of his real estate were insufficient to make up the said sum of £3,000, and the said sums of £1,000 to be held in trust for the said son William and the daughters.

The questions submitted for the opinion of the Court were—(1.) Whether all the testator's real estate was by the will charged with the sum of £3,000 and the several sums of £1,000, directed to be held by the trustees under the will upon the trusts therein mentioned in favour of the testator's son William and of each of the testator's daughters respectively. (2.) Whether the testator's residuary real estate or the proceeds of the sale thereof when sold were applicable towards making up the said £3,000 and the said several sums of £1,000. (3.) Whether all the testator's real estate, or his specifically devised real estate, or his residuary real estate, was chargeable with the said annuity by the will given to Sarah Logue, in exoneration of, or rateably with the said sum of £3,000 and the said several sums of £1,000, or whether such sums of £3,000 and £1,000 were chargeable with the annuity, in exoneration of all the testator's real estate, or of his specifically devised, or his residuary real estate. And (4) by what portion of the testator's estate should the costs of this special case be borne.

Ingleby, Q.C., for the plaintiff.—The other side will probably contend, first, that the real estate is the primary fund for the payment of the annuity; secondly, that the real and personal estate must bear the annuity rateably; thirdly, that the residuary real estate should be applied in aid of the residuary personalty so as to leave sufficient residuary personalty to pay the £6,000. To support the first contention an exoneration of the personal estate must be shown, which is impossible in this case, as the personalty is expressly made subject to the annuity as well as the realty. As to the second contention, the only cases where such a rule has been laid down are those in which there has been a mixed fund of real and personal estate created for payment of legacies, which does

not exist here. And then with respect to the third contention, real estate comprised in a residuary devise is not liable before a pecuniary legacy, and the assets will not be marshalled in favour of pecuniary legatees as against devised real estate. A residuary devise remains specific even since the Wills Act, by virtue of which a residuary devise would now pass real property acquired by a testator after the making of his will. See law *before* Wills Act in

Mirehouse v. *Scaife*, 2 My. & Cr., 695;

and, *since* the Wills Act,

Hensman v. *Fryer*, L.R., 3 Ch. Appeals, 420.

Several Judges dissented from Lord CHELMSFORD'S judgment in

Hensman v. *Fryer*,

but it has since been upheld on that point by the Court of Appeal in

Lancefield v. *Iggulden*, L.R., 10 Ch., 136.

The £3,000 and the three several sums of £1,000 mentioned in the will are not charged on the land, being evidently not intended to be included in the general charge of debts and legacies. In the case of

Allan v. *Gott*, L.R., 7 Ch., 439,

there was a mixed fund, but that case was different from this. The personal estate is the primary fund for the payment of the amounts, according to the well-known rule as to payment of legacies.

Downer, *Q.C.*, for the defendants, beneficiaries under the will.—The real estate is charged with the £6,000. This is shown by the general charge of debts and legacies, which otherwise would have nothing to operate on, except the small legacies of £50 each to the two surviving executors. If the real estate were not so charged,

then the annuity would be thrown on it, in accordance with the well-known principle, that where two legacies are given and one only is charged on the real estate, and the personal estate is insufficient to pay both, the legatee who has a charge on the real estate is thrown mainly on the realty, so as to leave enough of the personal estate for the payment of the legacy which has not the same advantage. In other words, the assets must be marshalled in order to carry out the intention of the testator that all the legacies should be paid—

Williams on Real Assets, 114-5
Hanby v. *Roberts*, Amb., 127
Masters v. *Masters*, 1 P.W., 421
Bonner v. *Bonner*, 13 Ves., 383
Scales v. *Collins*, 9 Hare, 656.

As an answer to these cases the plaintiff can only suggest that they apply to legacies only, and that the £6,000 here is not a legacy, but is to be met in a special manner out of the fund created for the purpose by the testator. But the principle of the cases cited must apply here in order to carry out the presumable intention of the will.

Nesbit, on the same side.—The principle of marshalling must apply in all cases where there are gifts by will, call them legacies or bequests or trusts, and whether they are technically legacies or not, payable primarily out of personal estate, and one class of such gifts has the advantage whilst the other has not of a charge over real estate. The plaintiff cannot, by saying that the £6,000 is not a legacy, reduce the beneficiaries to the rank of residuary legatees. The £6,000 was not a residuary bequest, but specific in its nature—

Williams's Real Assets, 108.

The real residuary bequest appears in a subsequent part of the will after all the testator's children have been specially provided for. The £6,000 is at least as special in its nature as an ordinary pecuniary legacy. In

Hensman v. *Fryer*

the LORD CHANCELLOR there said the devise was specific, because of the precise and definite nature of the gift, but the decision in the Court below,

L.R., 2 Equity, 627,

establishes that pecuniary legatees are entitled to marshall as against residuary devisees, independently of the special marshalling contended for by *Mr. Downer*. That case was only reversed on the ground that a residuary devise is still specific, but the reasons assigned were inapplicable in the present case, because the testator from the wording of his will did not seem to know whether he had any other land than that he specifically devised, the wording being "as to the rest of my land, *if any*." The principle followed in the Court below should be followed in any case where the devise was really residuary in its nature. The testator's presumed intention to exonerate the personalty as against the realty is not so strong in the case of legacies as of debts—

Jones v. *Bruce*, 11 Sim, 22
Lamphier v. *Despard*, 2 Dr. & W., 59.

Each will must be considered on its own basis.

Bootle v. *Blundell*, 1 Mer., 193.

Ingleby, Q.C., in reply.—The cases cited by *Mr. Downer re* marshalling are all cases of legacies, whereas in the present case the £6,000 is not a legacy, but a gift out of a fund specially created for the purpose—

Hancox v. *Abbey*, 11 Ves., 179.

The residuary personal estate is the fund out of which the £3,000 to William and the £1,000 to each of the three daughters are to be paid. (GWYNNE, P.J.—If the residuary personal estate amounted to £6,000 or £7,000, there would be no question here.) It is not a demonstrative legacy, and not one of those cases to

which marshalling applies. The Court will first have to be satisfied that the legacy of £300 was to be charged on the real estate. (GWYNNE, P.J.—I consider that an indisputable charge. Not a needle or pin's head in the estate was to be excluded from that liability. Every fragment of the property was charged with the annuity to Mrs. Logue.) The next question is whether the £6,000 (made up of the £3,000 to William and the £1,000 to each of the three daughters of the testator) is a general legacy, because, if not a general legacy, the question of marshalling will not apply. It is a fund given in trust. The learned Judge who decided the case of

Hancox v. *Abbey*

would have come to the conclusion that it was not a general legacy. (GWYNNE, P.J.—I think it was a demonstrative legacy given to the trustees.)

Cur. ad. vult.

26 November—

GWYNNE, P.J., now delivered judgment as follows:—I have considered the arguments in this suit and the cases adduced in support of them. The strongest point is that the doctrine of marshalling the assets is applicable to this case, and a great many cases were quoted in support of that view. I have come to the conclusion, however, that the principle does not apply, for if the assets were marshalled and the annuity to Mrs. Logue charged on the real estate, it would injure one of the sons who took landed estate under the will. In none of the cases quoted in support of marshalling does it appear that it injured any one. It put all on the same footing amongst themselves. But here it would seriously affect the testator's son William, who took a part both of the real estate and £3,000 of the personal estate. Besides, the doctrine of marshalling is subsidiary to the fundamental principle of intention on the part of the testator, and I have come to the conclusion that it was not the testator's intention that the assets should be marshalled and the annuity thrown solely on the real estate. I feel

quite confident as to that, and in my opinion, in point of law, the doctrine of marshalling is not applicable. It may be said that the annuity to Mrs. Logue was imposed equally upon each fund arising out of the personalty and realty, and I think that it should be rateably obtained both from the personal and real estate. I have been guided in some way in arriving at this conclusion by the consideration, that if, the real and personal property had been given altogether subject to the annuity to the widow, it would be clearly a mixed fund, and I do not see much distinction between charging the personal and real estate with the annuity and charging a consolidated fund. Therefore I have come to the decision that the real and personal estate should bear the burden of this annuity. I see some difficulties ahead as to conveying the land to the children when they come of age, but these are things in the future. All I have to decide at present is how this annuity is to be dealt with. In my opinion it should be rateably imposed upon both species of property—the personal and the real. The costs will be paid out of the mixed estate in the same manner as the annuity.

Case answered in favour of the defendant.

WAY, C.J., GWYNNE, J.] [COMMON LAW.

30 SEPTEMBER AND 28 NOVEMBER, 1878.

ROBIN AND ANOTHER v. THE NORTH ADELAIDE CO-OPERATIVE SOCIETY, LIMITED.

SALE.—Merchantable Quality—Acceptance—Reasonable Time.

Plaintiffs sold defendants a quarter-tierce of Black Swan tobacco, which, after delivery to the defendants, was placed by them in a damp cellar. About eight days after delivery the defendants, having sold a small portion of the tobacco, found the remainder to be mouldy, but gave no notice to the plaintiffs until five or six weeks after delivery, when they claimed to reject the tobacco and refused to pay the purchase-money.

On action for recovery of such purchase-money,

Held—*That the defendants had, under the above circumstances, lost by their delay and conduct any right they might have had to reject the goods.*

RULE calling upon the defendants to show cause why the judgment of the Adelaide Local Court should not be set aside and a new trial had between the parties, or judgment given for the plaintiffs, on the grounds, that the Court below erroneously determined that the defendants were entitled to reject the goods and refuse payment; that the defendants did not, by dealing with the goods, deprive themselves of the right to rescind the sale; that there was a warranty of merchantable quality; and that there was no evidence of an offer to return the goods within a reasonable time.

The action, which was tried in the Adelaide Local Court, was for recovery of £44 1s. 6d., being the purchase-money of a quarter-tierce of Black Swan tobacco sold by the plaintiffs to the defendants.

The facts were as stated in the head-note.

Stuart now moved that the rule be made absolute.

Symon showed cause.—The goods were not in saleable condition, and my clients were entitled to reject them—

Benjamin (2nd ed.), 529
Gardiner v. *Gray*, 4 Campbell, 144
Jones v. *Just*, L.R., 3 Q.B., 202, 204-5
Bushell v. *Wheeler*, 15 Q.B., 442.

There was an implied warranty that the goods should be delivered in a sound condition, and there was no wrong determination on the part of the Stipendiary Magistrate. There might have been an acceptance of the goods sufficient to satisfy the Statute, but not to disentitle the buyer to reject the goods if he afterwards found that they did not satisfy the conditions—

Grunoldby v. *Wells*, L.R., 10 C.P., 393
Parker v. *Palmer*, 4 B. & Ald., 387.

Per Curiam.—We will not trouble the other side. The defendants had no right to reject the goods. They received the tobacco, failed to examine it within a reasonable time, put it in a damp cellar where it was likely to get damaged, and when, some time subsequently, they opened the goods and found them in bad condition, they tried to rescind the contract. Nevertheless, they dealt with the tobacco, and did not send any notice to plaintiffs for five or six weeks—a most unreasonable time. Under these circumstances the rule will be made absolute to enter verdict for plaintiffs for £44 1s. 6d. with costs.

Rule absolute with costs.

26 AND 27 NOVEMBER AND 3 AND 16 DECEMBER, 1878.

BUCKNALL AND OTHERS v. BOTTING.

TRUSTEES.

A testator by his will appointed two persons as trustees, and empowered them or the survivor of them to administer the trust.

One of the trustees disclaimed and refused to accept the trusteeship, and the other trustee continued for some time to administer the same.

Held—*That the trust was not properly constituted, and that a new trustee must be appointed in place of the disclaiming trustee.*

SUIT for removal of a trustee and appointment of new trustees. The facts, so far as the same are essential for purposes of this report, are set out in the head-note, the other matters in dispute having been settled by arrangement between the parties.

Ingleby, Q.C., and *Robinson*, for the plaintiff; *Belt* and *Belt*, for the defendant.

GWYNNE, P.J.—The trust is not properly constituted. The testator intended to put his confidence in two individuals whom he named, and then he went on to say that they "or the survivor of them may administer the trust," but he clearly intended in the constitution of that trust to have it administered not by one trustee but by two. Of course Mr. Botting could not be regarded as the "survivor," because Mr. Kay, I am very glad to hear, is still alive and very well. Therefore I really think upon this matter that the trust is improperly constituted at present. There is bound to be another trustee—two new ones, or one associated with Mr. Botting. Of course if it came to this, that he would not name a trustee, or showed an obstinacy against any rearrangement of the trust, I should perhaps have to remove him altogether; but at present I cannot see why Mr. Botting should be removed.

Decree accordingly.

SUPREME COURT. { IN THE MATTER OF THE PETITION OF WILLIAM INGLIS. } EQUITY.

STOW, J., and on appeal
WAY, C.J., GWYNNE, J., BOUCAUT, J.] [EQUITY.

ON APPEAL.

12 AUGUST, 16 SEPTEMBER, AND 20 DECEMBER, 1878.

IN THE MATTER OF THE PETITION OF WILLIAM INGLIS, AND OF THE EDUCATION ACT, 1875, AND THE LANDS CLAUSES CONSOLIDATION ACT, NO. 6 OF 1847.

EDUCATION ACT, 1875.—*Lands Clauses Consolidation Act*, 1847—*Possession for twenty years—Persons under Disability—Payment of Purchase-money—Notices—Estoppel.*

A took possession of certain lands on July 17, 1858, *and remained in undisturbed possession thereof until June* 9, 1877. *On March* 12, 1877, *the Council of Education gave him notice that they required to purchase or take the allotment, and, being unable to agree as to the price, the amount was settled by a Special Jury at* £300. *The Council of Education being dissatisfied with the title, paid the purchase-money and interest, under direction of the Master of the Supreme Court, into a Bank to the credit of A or other the persons interested in the land, and thereupon executed a deed-poll vesting the land in themselves, under the provisions of the Lands Clauses Consolidation Act, by virtue of which deed they demanded and obtained from A possession of the land.*

A then petitioned for payment to him of the money, setting out the above facts, and that he was not aware of any right to the money in any person other than himself.

At the date of petition A and the owner had been more than twenty years in possession of the land.

Held—*That the Council of Education had vested in them by virtue of the deed-poll such interest in the land only as was vested in A.*

2. *That there was nothing to show that the objection to the title had not been removed by the twenty years' possession of A and the Council of Education.*

3. *That A was entitled to payment of the money.*

Semble—1. *That the Council of Education having executed the deed-poll, and obtained possession of the land and A's interest therein, were estopped from denying his claim to the money.*

2. *That the Council under the above circumstances should have given the necessary notices to the real owners, should have had the value of the land fixed by Justices, should have paid into Court*

the amount of such valuation, and should then have vested in themselves the fee-simple by means of a deed-poll.

3. *That, if the Council had so acted, A would not have been entitled to the money, but to the interest thereof only until the real owner appeared.*

PETITION for payment of money out of Court.

The petition set forth—1. That on July 17, 1858, the petitioner (William Inglis, of Hindmarsh, carpenter) took possession of Allotment No. 42, in Orsmond Street, township of Hindmarsh. 2. That he had ever since continued in undisturbed possession up to June 9, 1877, and had expended considerable money in buildings and improvements, and in payment of rates, on the said allotment. 3. That on March 12, 1877, the Council of Education, in pursuance of the provisions of the Education Act, 1875, gave him a written notice that they required to purchase or take the allotment, and were willing to treat for the same. 4. That the Council and the petitioner not agreeing as to the amount of compensation to be paid for the interest, the amount thereof was settled by a Special Jury, pursuant to the provisions of the Lands Clauses Consolidation Act, at the sum of £300. 5. That the petitioner failing to make out a title to the land to the satisfaction of the Council, they, on the 20th May, 1877, paid the amount awarded by the jury and interest thereon, amounting altogether to £300 19s. 9d., into the Bank of South Australia, at Adelaide, under the direction of the Master of the Court, to the credit of William Inglis, or other parties (if any) interested in the said land and hereditaments. 6. That on June 4, 1877, the Council of Education, under the powers of the Lands Clauses Consolidation Act, executed a deed-poll, whereby the allotment was vested in them. 7. That under the provisions of that Act the Council served a demand of possession of the allotment on the petitioner, and in pursuance thereof on June 9, 1877, he gave possession to the Council. 8. That the petitioner was not aware of any right to the money in any person other than himself. He therefore prayed—(1) That the money in question be paid to him; (2) that the Council be ordered to pay his costs, including all reasonable charges and expenses incident to the taking of the said land by the

Council and of the vesting thereof in that body; (3) or that the Court would make such other order in the premises as might seem to it meet. The affidavit of the petitioner in support of his petition verified the foregoing particulars, and stated that they were within his personal knowledge.

Stuckey and *Nicholson*, for the petitioner.—The petitioner, had he remained in possession for another year, would have had an indisputable claim to the land under the Statute of Limitations. At the time of the Council serving the notice to treat he had a devisable and saleable interest in the land—

Asher v. *Whitelock*, 1 L.R., Q.B., 1
In re *Jane Evans*, 42 L.J., Ch. 357
Ex parte *Winder*, L.R., 6 Ch., Div. 696.

As to whether any person entitled was under disability—

Lands Clauses Consolidation Act, sec. 79
Lloyd on Compensation, 163.

The Crown Solicitor (R. B. Andrews, Q.C.), for the Council of Education.—The petitioner by his own affidavit disclosed a bad title. With regard to possession the law was the same here as in England until the late alteration in the Statute of Limitations, and the title as to persons under a disability was *not* indisputable until forty years had expired—Act 14 of 1866-7. Unless the petitioner here showed that there was nobody under a disability respecting this land he failed to establish his title to it. The cases cited by the other side—*in re* Evans and *ex parte* Winder—differed *in toto* from the present case. In the former case (Evans's) the *onus* was shifted; and there it was an agreement to purchase something he had, whereas here there was no agreement. And in Winder's case there was also an agreement—

Douglas v. *L. & N.W. Railway Co.*, 3 K. & J., 173.

Stuckey, in reply.—It was the business of any one asserting disability to prove it. (STOW, J.—Suppose your client agreed to

sell the land and could prove his possession for twenty years, do you mean to say that the purchaser would be bound to accept that title?) Some cases go as far as that. (STOW, J.—But if you proved only twenty years' possession and did not prove who the real owner is—merely that you have been in possession for twenty years—would the purchaser be bound to take that title? I don't express an opinion, but simply ask if that is your view.) The party would not be obliged to show whether the real owner was under a disability or not. (STOW, J.—That answers my question affirmatively. that twenty years' possession would be sufficient to force a title on an unwilling purchaser. You are to show your title not merely to possession of the land but to this money.) The petitioner was much in the same position as Evans and Winder. Whether it was by notice to treat or by agreement, the result was the same, and the cases were on all fours with the present one. As to costs—

Lands Clauses Consolidation Act, sec. 80.

Cur. ad. vult.

16 September—

His Honor the CHIEF JUSTICE now read the judgment of His Honor Mr. Justice STOW, who was absent through illness:—The petitioner seeks to obtain payment to him of a sum of £300, and the interest thereon, deposited in Court by the Council of Education to the credit of the petitioner, or other the persons interested in Allotment No. 42 in the township of Hindmarsh. By the Education Act, 1875, the Council of Education are authorized to take by agreement, or compulsorily, any land required by them for the purposes of the Act, and all the sections of the Lands Clauses Consolidation Act of 1847 relating to the taking of lands compulsorily or by agreement, except such as are inapplicable to a public body like the Council, are incorporated with the Education Act (section 5). The Council are, by the 3rd clause of that Act, constituted a body corporate, and are therefore by the 2nd clause of the Lands Clauses Act "promoters of the undertaking." By the

Lands Clauses Act the powers of the promoters to purchase land by agreement, the persons who may sell land to the promoters and bind others interested, the nature of the estate or interest which enables its owner to sell, and the nature of the estates and interests which may be bound by him, are defined, as also are the powers of the promoters to take lands compulsorily, and the mode in which the estates and interests of persons other than those with whom the promoters may treat or upon whom they may serve notices and thereupon take the consequent steps to acquire a title. And in order to enable the promoters to acquire lands or any estate or interest therein against the will of the owner, it is clear that the real owner, or he who by the Acts is enabled to bind the rights of the real owner, must be dealt with, and that the mode of doing so prescribed by the Act must be strictly pursued. The promoters by the 6th section are empowered to agree with the owners of any lands authorized to be taken by them and required for the purposes of the special Act, and with all parties having any estate or interest in such lands, or by that or the special Act enabled to sell or convey the same, for the absolute purchase of such lands and of all estates and interests in such lands of what kind soever; and the 7th section authorizes all parties seised, possessed of, or entitled to any such lands, or any estate or interest therein, to sell or convey or release the same to the promoters, and to enter into all necessary agreements for that purpose; and then those, who not being absolutely seised, possessed, or entitled, may sell and bind the estates and interests of others, are specified as follows:—*i.e.* *(a)* Corporations, *(b)* tenants in tail, or *(c)* for life, *(d)* married women seised in their own right, or *(e)* entitled to dower, *(f)* guardians, *(g)* Committees of lunatics or idiots, *(h)* trustees or feoffees in trust for charitable or other purposes, *(i)* executors and administrators, and *(j)* all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject to any estate in dower, or to any lease for life, or for lives, or for years, or for any less interest, and such power to sell and convey or release may lawfully be exercised by all such parties (other than *(a)* married women entitled to dower, *(b)* lessees for life, or *(c)* for lives and years, or *(d)* for years, or *(e)* for

any less interest), not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person *entitled in reversion, remainder, or expectancy after them*, and they may do so in defeasance of the estates of such parties; and then the powers to sell of married women, whether of age or not, and of other parties under disability are set out. The money to be paid for land purchased or taken from any person under any disability or incapacity is to be ascertained in manner provided, and is to be paid into the Bank for the benefit of the parties interested. The purchase-money may in some cases be ascertained by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by Justices and otherwise; is not to be less than shall be determined by the valuation of two practical surveyors, and if necessary a third surveyor, appointed in manner prescribed by the Act (sections 9, 22 to 68 inclusive). All these clauses, it will be observed, have reference to the purchase by agreement and the taking of lands compulsorily. To purchase or take land or any estate or interest therein compulsorily the promoters must give notice to all the parties interested in such lands, or to those enabled by the Act to sell and convey or release the same, or such of them as shall after diligent enquiry be known to the promoters, and the notice shall demand from such parties the particulars of their estate and interest in such land, and of the claims made by them in respect thereof; and must state the particulars of the land so required, and that the promoters are willing to treat for the purchase thereof, and as to compensation for damage (section 18). All notices are to be served upon the parties interested in or entitled to sell such lands, either personally or at their last known place of abode, if any such can after diligent enquiry be found; and in case any such parties are absent from the province, or cannot after diligent enquiry be found, shall also be left with the occupier of such lands, or if there shall be no such occupier shall be affixed upon some conspicuous part of such lands (section 19). If after twenty-one days after service of the notice any party shall fail to state the particulars of his claim or to treat with the promoters, or if an agreement shall not be come to as to the amount of the compensation, that amount is to be settled

in manner provided. The purchase-money or compensation to be paid for any lands to be purchased or taken by the promoters from any party who by reason of his absence from the province is prevented from treating, or who cannot after diligent enquiry be found, or who shall not appear at the time appointed for the enquiry after due notice, shall be such as shall be determined by an able practical surveyor, to be nominated by two Justices (section 58 *et seq*). There are provisions for payment into the Bank of moneys to be paid for lands purchased or taken from persons having limited or qualified interests but authorized by the Act to sell, and for the application of such moneys under the order of the Court (sections 69 to 75), and by section 75 upon deposit of the money agreed or awarded to be paid in manner therein provided, on a default to convey or make out a good title, a deed-poll may be executed by the promoters, vesting all the estate and interest of the person agreeing to sell, or as between whom and the promoters the purchase-money shall have been awarded, and all estates and interests which under the Act he is able to sell and convey; and section 76 enacts that if the owner of land purchased or taken refuses on tender to receive the purchase-money or neglects or fails to make out a good title to the land or the estate or interest claimed by him, or if he refuses to convey or release the lands as directed, or if the owner be absent from the province, or cannot after diligent enquiry be found, then the money is to be paid into the Bank to the credit of the parties interested, subject to the control of the Court, and the promoters may then execute a deed-poll vesting in them the legal estate and interest of the parties for whose benefit the deposit shall have been made (sections 77 and 78). The moneys may be invested or distributed by the Court according to the various interests, and on any question as to the title to the lands in respect of which the moneys shall have been deposited the parties in possession of such lands, as being the owners or in receipt of the rents and profits thereof, shall be deemed to have been lawfully entitled to such lands until the contrary shall be shown to the satisfaction of the Court, and, unless the contrary shall be shown, shall be deemed entitled to the moneys so deposited and the dividends and interest, and the same shall be paid and

applied accordingly (section 79). The promoters are prohibited from entering upon any lands required to be purchased or permanently used without the consent of the owners and occupiers until they shall either have paid to every party having any interest in such lands or deposited in the Bank in manner therein mentioned the purchase-money or compensation agreed or awarded (section 84). But on a valuation by a surveyor appointed by two Justices and deposit of the amount awarded by him, and the giving of a bond with sureties, the promoters may enter. By the 89th clause the promoters are subject to heavy penalties for wilfully taking possession of lands without pursuing the course prescribed by the Statute to entitle them to do so. The petition and affidavit in support set out—(His Honor here read the petition). Although not expressly stated it is evident from these allegations that the petitioner had no estate or interest in the land other than that arising from his possession. Neither in the petition nor affidavit does it appear whether the petitioner, in reply to the notice to treat, stated the particulars of his estate or interest in the land and the claims made by him in respect thereof, as required by the Act; so that if I had only the proceedings in this application before me I should not know on what basis the jury proceeded, or what was the nature of the estate or interest in respect of which the value was assessed. But I have seen the notice, claim, warrant, and inquisition, and it appears that the petitioner claimed to be the owner, which, unless it meant the real owner of the fee simple or the statutory owner, *i.e.*, the person entitled to sell and convey the fee-simple, was invalid for uncertainty as not showing the nature of the estate or interest in respect of which he claimed compensation, and therefore not affording a basis on which the inquisition could proceed (*Healey* v. *The Thames Valley Railway Company*, 34 L.J., Q.B., 52). But the petitioner treated with the Council, claiming £350 as the price of the land, which must mean of the fee-simple. So soon, therefore, as the price of the fee-simple of the land was ascertained by the verdict of the jury the petitioner and the Council occupied the positions of vendor and purchaser; and if the petitioner failed to make out a good title, and, it would seem, a forty

years' title, there was no obligation on the Council to pay him; but they might, if they thought fit, pay the purchase-money into Court and execute a deed-poll which would vest in them the estate or interest of the petitioner and all other estates and interests which he could sell and convey by virtue of the Act. That course has been adopted, and the petitioner says that the deed-poll vested the fee-simple of the allotment in the Council. But that is not so, unless the petitioner is the owner or has such an estate as would enable him under the statutory powers to sell the fee-simple. It is clear that the petitioner was not the owner of the land when the money was paid in. He had an interest, and a valuable interest, arising from possession for more than nineteen years (*Asher* and *Wife* v. *Whitlock*, L.R., 1 Q.B., *ex parte* Winder, 6 Ch. 700-1); but his dealings with the Council by agreement or under the compulsory clauses could not affect the rights of any person interested in the land, except such as he as owner could bind, or those which were estates or interests in reversion, remainder, or expectancy after him, as the statutory powers to bind estates and interests other than those of the person dealing with the promoters either by agreement or under the compulsory clauses do not extend to estates or interests paramount or adverse to his own. (*Douglas* v. *London and North-Western Railway Company*, 3 K. & J., 173.) There the plaintiff had contracted with the promoters to sell under the provisions of the Lands Clauses Act for a certain sum land required by the promoters for the purposes of their railway. The plaintiff could show no title except certain promissory declarations since a certain date, when the lands were purchased partly with his own money and partly with the money of his then partner, one Warneaby (who was dead), under an agreement that it should be considered a partnership account. The promoters refused to pay the money to the plaintiff or into the Bank on the ground that, in consequence of conflicting claims under Warneaby's will, they would not acquire a title by payment into the Bank or the execution of a deed-poll. The plaintiff filed a bill for specific performance or that the Company might be ordered to pay the money into the Bank under the 76th section. Vice-Chancellor WOOD

held that as regards Warneaby's claim the Company would acquire a clear title by paying the money into the Bank and executing a deed-poll, inasmuch as the plaintiff was the absolute owner (subject to the question as to the sixty years' title), or else he was the owner *quâ* surviving partner, whose duty it was to wind up the partnership (p. 182), and His Lordship said that if the object of the Company was only to obtain a clear title against Mr. Warneaby (that is against his representatives) he had no doubt that that object would be perfectly attained by depositing the purchase-money under the 76th section. But whether the plaintiff had a right to insist on the money being so deposited was a different question (p. 183), and as the plaintiff had agreed to give a sixty years' title His Lordship refused to decree specific performance or that the Company should deposit the money in the Bank, taking the title they would acquire by that payment instead of the sixty years' title for which they contracted. But he added that if the claim of the plaintiff had been in the alternative that the Company should either perform or abandon the contract, he had no doubt as to the course the Court would have adopted, for it was upon the faith of the contract, and upon that only, that the Company took possession; and the cause stood over that the plaintiff might bring that alternative distinctly before the Court. In the present case the Council have not acquired the fee-simple, unless, by the subsequent lapse of time making up twenty years, the real owner is barred. In the case above quoted the ground on which the Vice-Chancellor refused to compel the promoters to pay the purchase-money into Court was that that mode of proceding is only applicable where the difficulty is one of conveyance and not of title, as when the person dealt with is seised of the lands, but the estate or interest of a jointress, doweress, or other third person in a similar position exists. In other and some more recent cases the purchase-money had been paid in under agreements for sale when the vendor failed to make out a title, and the Courts directed the payment of the whole purchase-money when the difficulties in the way of making a title had been removed by the statutory limitation having since the payment of the money into Court been reached, and the real owner thus barred. (*Ex parte* Winder, *supra.*)

The fund which was ordered to be paid out in this case, on the ground above stated, was the subject of an application to Vice-Chancellor STUART some years before (*re Greenough* v. *Hollingsworth*, 24 L.T., N.S., 347), and His Lordship refused to order payment to the claimant Hollingsworth, who was claiming in the same interest as the petitioners *in re* Winder, on the ground that when the land was taken by the promoters the possession of the applicants was that arising from a bare possession; and although the continuance in possession by Hollingsworth, the petitioner, for the full period of twenty years might have given him a claim to the land as against Wright, yet as it did not last so long by reason of the act of the promoters in taking possession the petitioner had no claim. This view is contrary to that taken in the case of *in re* Winder in reference to the same fund, as also to that expressed and acted upon *in re* Jane Evans (42 L.J., Ch., 357), where the removal of the difficulty arising from the want of title by the lapse of the statutory limit was not absolutely proved. Where money had been paid into Court by promoters for the purchase of land (but whether under a contract or otherwise does not appear) on the application of a person who had been in possession for years as entitled to the rents—the difficulty arising on the very doubtful construction of a will which was at the root of the title—the Court did not order the money to be paid out to her, but, on the ground that she, by the 79th clause of the Act, must be taken to be the owner until the contrary was proved, and it had not then been proved to the contrary, ordered the payment to her of the income. (*In re* Perry's Estate, 1 Jur., N.S., 917.) It is pointed out in the cases that the payment of money into Court is not the proper course to adopt in a case like this unless the only object is to acquire the estate or interest of the person with whom the promoters have dealt, and such estates and interests as he by the Act is empowered to sell and convey. The Council might have resisted any attempt to obtain the money by action or to compel a specific performance. But if they pay the money and execute a deed-poll they acquire whatever interest the person with whom they deal possesses, and the rights to possession as against him which they could not obtain otherwise except by pursuing the

statutory method (section 89), and the money would seem to be the equivalent of his estate and interest in the land subject to claims such as those of a doweress, jointress, or other person having a similar outstanding estate or interest, and the money is certainly his if the objections to the title are removed. (See Winder's case and *Douglas* v. *Thames Valley Railway Company*, above quoted.) *Mr. Andrews* drew a distinction between the cases *in re* Evans and *in re* Winder and this, as those were cases of purchase by agreement and this is not. But on consideration I see no difference, as the provision for the payment of the money and for its disposition is the same in either case, and the notice to treat and inquisition amount to a contract. (*Stone* v. *Commercial Railway*, 4 My. & C., 122; *R.* v. *The Woods and Forests Commissioners*, 17 L.J., Q.B., 345.) This case must be decided in accordance with the cases above quoted. There may have been some one or more persons owning the land under disabilities preventing the Statute from running, and thus there may be a person entitled to claim the land and eject the Council. But although the presumption under the 79th clause of the Act that the petitioner was owner at the time the land was taken and the deed-poll executed is removed by the petitioner's own case, it appears that the real owner is barred by the twenty years' possession of the petitioner and the Council, unless he was at the time the petitioner took possession under a disability, and that or successive and continuous disabilities have existed which have prevented the Statute from running. There is the uncontradicted evidence of the petitioner that he knows of no title or claim to the land (and he was in possession when the Council took it), and they have by the execution of the deed-poll vested in themselves the petitioner's estate or interest, although they have failed to acquire the fee-simple if any one else owns the land. If they had taken steps to bind the real owner by giving the necessary notices, by having the value of the land fixed by a surveyor appointed by Justices, by paying the amount so fixed into Court, and by executing a deed-poll, thus acquiring the fee-simple, it might have been difficult for the petitioner to obtain the money, although the income might have been his until an owner appeared, as the Act was not intended to inter-

fere with the rights of parties unnecessarily, and in the absence of the real owner, the person in possession, as entitled to the rents and profits, would have the same rights as to the purchase-money and the income arising therefrom as to the land and the rents and profits. The Council might have refused to summon a jury as required by the petitioner, on the ground that he was not the owner, or, after the inquisition, might on the same ground have refused to pay the amount awarded by the jury. If they decided not to pay the amount awarded they should have abandoned the proceedings, and thus placed the petitioner *in statu quo ante;* but instead of this they have by the execution of the deed-poll deprived the petitioner of all his interest in the land, and it is a question whether their acquisition by payment into Court of the sum awarded, and by the execution of the deed-poll, of the petitioner's interest in the land, does not estop them from denying that the moneys are his, as there are no outstanding estates or interests which come after his, or which are not paramount or adverse to his. *(In re* Winder, *supra.)* I do not decide upon that point alone, but because also there is nothing to show that the difficulty in the way of proving a title has not been removed by the uninterrupted possession for twenty years by the petitioner and the Council. The moneys must be paid to the petitioner, and he is entitled to his costs, to be paid by the Council.

Order for the petitioner accordingly.

20 December—

The Council of Education having appealed against the foregoing decision, the appeal now came on for argument before WAY, C.J., GWYNNE, J., and BOUCAUT, J.

Symon, for the appellants.—Although Mr. Inglis had proved possession for twenty years, yet he had not shown that there was no person under disability, which would prevent the Statute of Limitations from running.

Stuckey and *Nicholson*, for the respondent.—Inasmuch as the notice of claim stated that Mr. Inglis only claimed the land on the ground of twenty years' possession all the jury assessed was the value of his interest therein, and it was not incumbent upon them to show anything except what was stated in their notice of claim.

Per Curiam.—Inasmuch as Inglis's notice of claim stated that he only claimed the land on the ground of twenty years' possession and after the jury had assessed the amount of compensation for his interest the Council of Education took possession by arrangement with Inglis of all the estate and interest he had, it would be inequitable for the Council not to pay him the compensation awarded by the jury.

Appeal dismissed with costs.

WAY, C.J., GWYNNE, J., BOUCAUT, J.] [COMMON LAW.

23 OCTOBER, 18 NOVEMBER AND 20 DECEMBER, 1878.

BONNIN AND ANOTHER v. ANDREWS.

REAL PROPERTY ACT, 1861—*Deprivation of Land—Compensation—Time within action to be brought.*

The deprivation contemplated by sec. 125 *of the Real Property Act*, 1861, *occurs immediately on the bringing of the land under the provisions of the Act, and a person deprived of land by the same being so brought under the provisions of the Act, must bring his action within six years from the date of such bringing under, though he may not have had notice or knowledge within that period that the land has been so brought under.*

THE action was brought against the Registrar-General to recover compensation for loss sustained through the bringing of land, the property of the plaintiffs, under the provisions of the Real Property Act, 1861.

The land in question was formerly the property of Mr. Matthew Smith, who by a deed made before the Registration Act came into force, and consequently unregistered, conveyed the land to His Honor Mr. Justice Gwynne, then Mr. E. C. Gwynne—through whom the plaintiffs claimed.

Mr. Colley, in 1865, made application to have the same brought under the provisions of the Real Property Act, 1861, and was registered as the proprietor pursuant to such application.

The land was unoccupied, but the plaintiffs paid rates for same until and for years after the date of such application, and had no knowledge of such application or of the land having been brought under the Act, until some two years before action, when one Curtis, having recently purchased from Mr. Colley's trustees, and obtained from them a transfer under the Act, entered into possession, and

began to build on the land. It did not appear that Mr. Colley, when he made application, or at any time, had any knowledge or notice that the plaintiffs, or any other persons, were, or claimed to be, in possession of the land.

The action was tried before His Honor Mr. Justice BOUCAUT and a jury, and a verdict found for the plaintiffs for £127 10s., leave being reserved to the defendant to move to enter a nonsuit, on the ground that the action had not been brought within six years after the deprivation complained of.

Ingleby (Q.C.), having, on the 23rd October, obtained a *rule nisi* to enter a nonsuit pursuant to leave reserved, now moved that such rule be made absolute.

Kingston showed cause.—The Real Property Acts were intended simply for the purpose of simplifying the transfer of property, not to turn a bad title into a good one. Their main object was to substitute a certificate of title for a mass of deeds, and a simple transfer for an elaborate conveyance. But it was never the intention of the Legislature to give a man a title simply by his bringing the land under the operation of the Act. (Secs. 33, 40, fourth subdivision of section 124.) Mr. Colley's application was fraudulent in stating, however innocently, that he was seised in fee of the land, and that no person was in occupation of it or had any claim to it. He ought to have made enquiries as to who the proprietor was, and if he had done so he would have succeeded. He had the means of ascertaining the facts within his power. Mr. Colley's certificate came within the exception referred to in section 33, and being fraudulent it would not be assisted by section 40; and had he by any means succeeded in getting possession of the land he would have been liable under the fourth division of section 124 to have been ejected at the suit of the plaintiffs. His application did not deprive the plaintiffs of their land. So long as Colley's certificate remained in his name it was worthless as against the plaintiffs. As to the date of the deprivation, it must either have occurred at the time Curtis became the registered proprietor of the

land, or at the time it was pegged out for the purposes of sale, or at the time Mr. Atkinson was aware of possession being taken, and in each of these cases the plaintiffs would be within the period of limitation. I submit that the deprivation occurred by the registration of Curtis. The land was unfenced and there was no one actually using it, still the plaintiff's representative, Mrs. Atkinson, was virtually in the possession and occupation of it. She was in the habit at various times of walking over it; she paid the rates for it, and certainly there is no evidence of there having been any interference with her possession except that of Curtis, who says that at the time of the sale he found it pegged out. Consequently until this time there was no person against whom the plaintiffs could have maintained an action of ejectment. The only thing they had to fear was what actually happened; the transfer of the land to a *bonâ fide* purchaser for value. Then it was that the whole position of the parties was changed, and Curtis's title became paramount. Up to that time the plaintiff's title was paramount, and there was no deprivation. Till then they could have taken proceedings under section 125. They were not deprived by the land being brought under the Act, as their title was paramount to Colley's. They were in possession of the land, and they could also have taken steps to cancel Colley's certificate. They had then sustained no damage and could maintain no action against the Assurance Fund, consequently the period of limitation did not then commence to run—

Backhouse v. *Bonomi*, 9 H.L. Cas., 503.

Ingleby, Q.C., in reply.—If Mr. Atkinson was physically in possession, that is actually in possession, *Mr. Kingston* is out of Court by virtue of clause 134, which provides that a person in actual occupation, and entitled to the land, has a defence against the person having a certificate of title to it. "Every certificate of title issued in respect of the same land . . . to any person claiming or deriving title under or through the applicant proprietor shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to such land . . . at the

time when such land was so brought under the provisions of this Act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of the said land." That clause might seem absurd to a lawyer, because to the Real Property lawyer the word "adversely" would mean wrongfully, but a reference to clause 15 shows it must be an occupancy adverse to the person holding the certificate of title. The facts however show that Mrs. Atkinson was not in actual possession. It was vacant land, and therefore the above argument does not apply to the case. As to the chief point in the case, when a person may be said to be deprived of land under section 130, the test is whether or not a registered proprietor can bring an action against any person in possession for the recovery of the land say against John Styles a trespasser—

Darby and *Bosanquet* on the Statute of Limitations, 218.

It is clear that in the assumed action against a trespasser the trespasser would have a right to set up a *jus tertii*, which would be absolutely proved by putting in the certificate of title to Mr. Colley. On that view of the case the deprivation here took place when Mr. Colley got his certificate of title. It appears to me that section 125 gives its own interpretation of when the deprivation took place, because it says that "any person deprived of land or of any estate or interest in land in consequence of fraud through the bringing of such land under the provisions of this Act," &c., which must mean that in the opinion of the Legislature the bringing the land under the Act is a deprivation. (WAY, C.J.—What is the meaning of persons being deprived of land "in consequence of fraud?") The deprivation in the Act is divided into three clauses: —First, by bringing land under the operation of the Act; secondly, when, after land is brought under the Act, a transfer is effected by means of fraud, such as a forged certificate, or the fact that a person is the eldest son being suppressed from his knowledge, as in the case of

Vane v. *Vane*, L.R., 8 Ch., 383,

where it was held that a person designingly bringing up his son in the belief that he was a second legitimate son, when the fact was that his elder brother had been born out of wedlock, was a case of fraud ; or a transfer signed by a person of the same name as the registered proprietor, which is the case of

Brady v. *Brady*, 8 S.A.L.R., 219 ;

and thirdly, where in the case of land being under the Act there is error or misdescription in the certificate of title, and probably all the class of cases which are alluded to in section 138. As an illustration of these last cases take the following:—If an attesting witness made a declaration of his personal knowledge of a person signing an instrument, when, in fact, he did not know him, but *bona fide* believed that he did, in that case the Registrar-General would be deceived, and I think that would come under, if not the first, then the third class of cases mentioned in clause 125. By section 33 a certificate of title is conclnsive evidence of the title of the person named therein, and that land has been duly brought under the provisions of the Act, and "no certificate of title shall be impeached or defeasible on the ground of want of notice or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application." Also section 40 provides that the registered proprietor shall hold his land free from all other estates except the estate or interest of the proprietor claiming the land under a prior certificate of title. Mr. Colley was guilty of no fraud, he could have acquired no knowledge of the existence of a title-deed—an unregistered deed—which was dormant in the chest of the plaintiffs, or would the ratebook in which there was nothing to identify this particular piece of land, have given him any information. Mr. Colley had something which he had reason to believe gave him a good title, and the Lands Titles Commissioners considered it a good title, and the certificate of title was accordingly issued to him. The mere mistake of a man bringing property under the Act does not constitute that fraud which is contemplated by section 124. It must be actual, not

constructive fraud. (BOUCAUT, J.—It seems to me that if the Legislature intended to make the bringing of land under the Act a deprivation it would be stated in the Act. What is the meaning of the words in section 130: "no action for recovery of damages sustained through deprivation of land . . . shall lie . against the Registrar-General or against the Assurance Fund?") Clause 125 absolutely and in terms makes the bringing of land under the Act deprivation, and the word "deprivation" in clause 130 is a generic expression of which "bringing under the Act" is only a species.

Cur. ad. vult.

20 December—

Judgment herein was now delivered, as follows:—

WAY, C.J.—This is an action against the Registrar-General, as nominal defendant, under sections 125 to 130 of the Real Property Act 1861. The first count of the declaration states, that the plaintiffs, being seised in fee-simple of part allotment 76, Glenelg, Richard Bowen Colley falsely and fraudulently brought the land under the provisions of the said Act; that a certificate of title was issued to him for the fee-simple thereof, and he became the acknowledged proprietor of such fee-simple, and, afterwards, the said Richard Bowen Colley died and the said land was transmitted to Isabella Colley, to whom a certificate of title was issued for the fee-simple thereof, and she became the registered proprietor of such fee-simple, and, afterwards, the said Isabella Colley transferred the fee-simple of the said land to Thomas Curtis, who was a *bona fide* purchaser and transferee for value, and who became the registered proprietor thereof, all of which matters happened without the knowledge of the plaintiffs, and in consequence of the registration of the said Thomas Curtis as proprietor of the said land and the fee-simple thereof the plaintiffs were deprived of the same. The second count states, that, by reason of the matters set out in the first count, the plaintiffs were deprived of the said land and of the

fee-simple thereof in consequence of fraud. And a third count states, that, by reason of the matters and things set out in the first count, the plaintiffs were deprived of the said land and the fee-simple thereof through the bringing the same under the provisions of the said Act. The defendant pleaded; first, that he was not guilty, second, that the plaintiffs were not seised in fee, and thirdly (under section 130) that the cause of action did not accrue within six years. At the trial, before Mr. Justice BOUCAUT, a verdict was given under his direction, for the plaintiff for £127 10s., subject to leave reserved, under which the defendant has moved to enter a nonsuit. It appeared upon the trial that the plaintiffs had at no time such a physical possession of the land as —amounting to what in section 134 is called being "adversely in actual occupation"—would, under that section, render the certificates of title mentioned in the declarations void. The plaintiffs, however, were seised in fee-simple. Their *cestui que* trust, Mrs. Atkinson, walked over the land occasionally, and paid the rates assessed upon it, but it was unoccupied. In 1865 Mr. Colley brought the land under the Real Property Act, and, in January, 1876, his widow transferred it to Thomas Curtis, who at once entered into possession. Until then the plaintiffs and Mrs. Atkinson had no notice, or knowledge, that the land had been brought under the Act. On the part of the plaintiffs it was contended that Mr. Colley's title was vitiated by fraud. His application showed a list of title-deeds, which, though displaced by the superior title of the plaintiffs, could reasonably and, we have no doubt, did actually convey to his mind an honest belief in the validity of his own title. There is no evidence that he had any notice of the plaintiffs' title, and we do not think, that the bare fact of rates having been paid by some one else affords, as against him, the slightest presumption of fraud. There being no evidence in support of the charge of fraud, the declarations must be read as if the statements of fraud were omitted. The question then arises —When were the plaintiffs deprived of their land? Was it when Mr. Colley became the registered proprietor, or was it not until the transfer to Curtis and his taking possession? If the latter was the date the plaintiffs are entitled to hold their verdict. If the former,

this action is barred by section 130, as "it was not commenced within the period of six years from the date of such deprivation." Mr. Colley's certificate of title, under section 33, was conclusive "evidence" that he was seised in fee-simple. By force of section 40, as a "registered proprietor," he was to "hold" the land "absolutely free from all other estates and interest," including, of course, the estate and interest of the plaintiffs. He could therefore have maintained ejectment himself, if the plaintiffs or any one else had taken possession. And under section 124 "no action of ejectment or other action for the recovery of (his) land" could "lie or be sustained against him," and "the production of (his) certificate of title" was "to be held, in every Court of law or equity, to be an absolute bar and estoppel to any such action against" him. The title which became vested in Mr. Colley was, in fact, as complete as statutory words could make it. What then had happened to the plaintiffs' title? The fee-simple which had been theirs was now vested in Mr. Colley, and they could neither defend nor maintain an action for the possession of the land. They were in fact, in the words of section 125, upon which this action was brought, "deprived of land or of (an) estate or interest in land . . . through the bringing of such land under the provisions of (the) Act or by the registration of some other person as proprietor." And this result was complete at the instant the land was brought under the Act and the certificate of title was registered—in other words, what, in section 130, is called "the date of such deprivation," was the date of Mr. Colley's certificate of title and registration as proprietor. Long before Curtis's transfer was signed, and long before he took possession, the plaintiffs' estate and interest in the land had ceased, and their "deprivation" was a completed act. We are therefore of opinion that "the date of deprivation" must be computed from Mr. Colley's certificate, and not from the transfer to Curtis, or his entering into possession. The plain language of the Act has forced us reluctantly to a conclusion we would have gladly avoided. The plaintiffs' is undoubtedly a hard case. Without any fault on their part, and behind their backs, their land was taken away. Before they knew what had happened their right to the statutory compensation was barred. This Court,

however, has to administer and not to make the law; and although we cannot help expressing a hope that the Government may authorize payment to the plaintiffs of the compensation of which the law so harshly deprives them, we are of opinion that the rule to enter a nonsuit should be made absolute.

GWYNNE, J.—It was attributed to Mr. Colley, but withdrawn to a certain extent, that he had acted fraudulently, and I should like to point out the position in which Mr. Colley actually was in regard to this matter. The section, which had been sold in the lifetime of Mr. Smith to Mr. Croxall, was sold under the old law, and Mr. Croxall got as absolute and complete a title as the law of England attached to real property; nothing could have deprived him of the land except his own act. But Mr. Smith, not knowing that this section had been conveyed to Mr. Croxall, made a will, and in general language all the real estate of which he was seised was conveyed to trustees. Litigation afterwards arose, the son of Mr. Smith filed a bill in equity against the trustees, a decree was made, and it was ordered that all the lands belonging to the late Mr. Smith should be sold. Accordingly they were put up to public auction under the superintendence of the Master of the Court, and the piece of land in question, together with other lands, was bought by Mr. Colley for £142 5s. 8d., which it might be presumed was the fair and marketable value of the estate at that time, seeing that it was bought at public auction. This was the way in which Mr. Colley purchased it. A receipt was of course given by the Master for the purchase-money, and the trustees conveyed the property in question to Mr. Colley. Mr. Smith having parted with the land during his lifetime of course did not have it when he died, but he conveyed it back generally. Several portions of his land had been sold, and he conveyed all his land except such as had been sold, but did not show what had been sold; so it was all his own doing. The difficulty was a very serious one to Mr. Colley. He filed an application in the usual form to bring the land under the Real Property Act; this went before the Commissioners, the Registrar-General being one of them, and they said, "We cannot register it because it is a good title, for it is a bad title, and we can

only register it under section 17 of the Act as a blemished title." It was advertised, but no caveat was entered, and the Registrar was then ordered to issue a certificate of title to Mr. Colley. In every respect he conformed to the requirements of the law. No one was in possession. Mrs. Atkinson stated that she walked over the land and paid the rates in respect of it, but that was not possession within the meaning of the Act. The title which Mr. Colley got was as complete and as fair a title as could be obtained under the operation of the Act. He bought the land at public auction, he bought it under the sanction of the Court, he showed his hands to the Commissioners, he kept nothing back. There was no concealment; all was fair and straightforward. It was a perfect misapplication of the term to charge him with fraud, either legal or moral fraud.

BOUCAUT, J.—I have struggled vehemently against this judgment. I feel very strongly that in upholding the Real Property Act in the present case a great injustice would be done to an innocent person, but the arguments of *Mr. Ingleby* and the reasoning under the Act convince me that no other judgment could possibly be given.

Rule absolute.

WAY, C.J., GWYNNE, J., BOUCAUT, J.] [COMMON LAW.

20 DECEMBER, 1878.

IN THE MATTER OF JOHN MITCHELL SINCLAIR AND THOMAS SINCLAIR, INSOLVENTS, EXPARTE THOMAS SINCLAIR.

INSOLVENT ACT, 1860.—*Contracting debt by false pretences—Debt—Bill of lading—Costs.*

An Insolvent was convicted by the Commissioner of Insolvency of contracting a debt by means of false pretences under the following circumstances:—

The Insolvent, before his insolvency, sold to the Bank of South Australia a certain Bill of Exchange on Messrs. Carter & Co., of Sydney, falsely representing that certain goods consigned to Messrs. Carter & Co., and against whom the Bill of Exchange was drawn, were shipped on board a certain vessel. The Bank afterwards found that the goods had not been so shipped, and obtained from the debtor bills of lading for 163 *bags of flour, and thus reduced the alleged debt to* £80, *over and above the amount of the Bank's commission. The Bill of Exchange on Messrs. Carter & Co. was never presented.*

Held—*That the transaction was one of sale and purchase, and that no debt was ever created.*

Costs ordered against the Bank.

APPEAL from an order of the Commissioner of Insolvency, whereby Thomas Sinclair was ordered to be imprisoned for six months, on a charge made against him by the Bank of South Australia, of contracting a debt by means of false pretences.

The facts were as stated in the head-note.

Symon, for the appellant.—It is necessary to the validity of the conviction that there should be a debt existing at the time of the insolvency and conviction, and that was not established. (WAY, C.J.—It occurs to me that this transaction was one of sale and purchase, and although a criminal prosecution might have lain, assuming there was a false pretence, I cannot see how a debt arose within the meaning of the act. There was probably a contract.) Exactly so. But I submit further that even if there had been a debt originally it was wiped out or condoned by the Bank accepting,

with knowledge of the alleged fraud, other bills of lading in substitution, or part substitution, of the original debt. They took bills of lading for 163 bags of flour per Star of Peace and Seagull, at least, in part liquidation of this alleged debt which they say was contracted by fraud. Further than that the debt for £80 odd was not due, because they never sent on the bills to Sydney, and yet they retained the exchange or discount which was the consideration for their purchasing. If they had filed a bill in equity to rescind the contract on the ground of fraud they must have offered to do equity by returning this money, but they have not done so. This was not the position they took. In this respect the debt would have been some pounds less than £80. (BOUCAUT, J.—That struck me very forcibly, and in addition to that it appears by the evidence that the Bank Manager, Mr. Henderson, after knowledge of the alleged fraud assented to the deed of assignment and exerted himself to procure other assents to get the deed carried.) That is one of the strongest circumstances to show the Bank never regarded this transaction as fraudulent until long afterwards when the case got into the Insolvency Court, and, for some reason or other, they were ill-advised enough to start this, which had really been condoned, if it ever was an offence. In addition to that, Mr. Henderson's evidence shows, that he could not reasonably have believed, or acted on, the alleged representations.

Belt, jun., for the Bank of South Australia, submitted to such order as the Court might think fit to make.

WAY, C.J.—What do you say, *Mr. Belt*? Where is there any evidence establishing a debt?

Belt.—There was the purchase of the draft and the payment by placing the amount to insolvent's credit.

GWYNNE, J.—But how could that constitute a debt? Suppose it had been a gold snuffbox instead of a bill of exchange?

WAY, C.J.—And the Bank have not taken the position of rescinding the contract, and the right to the indemnity has not arisen, because the bill never was presented.

GWYNNE, J.—The test is, could an action have been maintained on this bill. I do not think it could.

WAY, C.J.—In this case the insolvent was convicted of, in fact, a criminal offence, to the validity of which conviction it is necessary that the debt which he was charged with having contracted by means of false pretences should have existed. *Mr. Symon's* argument satisfies me that no such debt as mentioned in the charge existed. I have asked *Mr. Belt*, the learned counsel for the Bank, to point out on what part of the evidence he relies as showing the constitution of the debt, and those parts of the evidence to which he has directed my attention do not satisfy me. I do not think it necessary for me to go through the whole of the evidence. The insolvent must therefore be discharged.

GWYNNE, J.—I am of the same opinion. The debt is not made out. I think the Bank should be here to assist the Court. They leave it unsupported. At the most, it appears that they have purchased a merchantable article, namely, a bill of exchange, upon a false representation. It does not appear to have ever gone out of their possession. It was no debt.

BOUCAUT, J.—I have read the whole of the evidence very carefully, also the judgment of the learned Commissioner, and the impression it has made on my mind is, that the insolvent's account of the transaction is more probable and reliable than that of the Bank Manager, Mr. Henderson. No doubt, if the insolvent had had the advantage of being represented by counsel, this technical point as to debt would have been pointed out to the learned Commissioner, and the case would then have taken a different course. For these and other reasons, I think he should be discharged.

Symon.—I ask for costs of the appeal against the Bank. In one of the cases *re* Levi's assignment costs were ordered against the respondents, and in the other each party was ordered to pay his own. It is discretionary.

Belt, on the other side.

Per Curiam.—The Bank must pay the costs of the appeal.

Insolvent ordered to be discharged, costs to be paid by the Bank.

21 DECEMBER, 1878.

IN THE MATTER OF THE DEVON CONSOLS MINING COMPANY, LIMITED, EXPARTE WOOD.

COMPANIES ACT, 1864.—*Memorandum of Association—Articles—Limited liability—Power of Directors to make call—Transfer.*

The Articles of Association of a Company, of limited liability, registered under the Companies Act, 1864, *contained, amongst others, the following provisions:—*

1. *A power for the directors to make calls, not exceeding, at any one time*, 2*s.* 6*d. per share, provided that, in the event of a larger sum being required for the purpose of working the mines on the property of the company, over and above the call which the directors were thereby authorized to make on the property of the company, it should be lawful for the shareholders, at any general or special general meeting, to make such further call or calls as the majority of shareholders at such meeting might think proper.*

2. *A power to the directors to refuse to register any transfer, if, at the time of the same being lodged for registration, the transferor were indebted to the Company.*

There was nothing in the Memorandum of Association of the company to warrant the proviso above mentioned.

Held—*That the proviso was* ultra vires, *and a call made pursuant thereto did not constitute a debt, so as to justify the directors in refusing to register a transfer.*

APPLICATION to remove the name of Mr. H. A. Wood from the register of shareholders of the Devon Consols Mining Company, Limited.

The facts are fully stated in the judgment.

Nesbit for Mr. Wood; *Ingleby, Q.C.*, for the Company.

GWYNNE, P.J., said that this was called a limited Company. The capital was divided into shares, and the Directors had power to make calls from time to time not exceeding 2s. 6d. at any one period, and this was the general mode of procuring the revenue by which the trade of the Company was conducted. But in the

deed of settlement a most extraordinary provision was introduced —one which he had never seen before and which was altogether opposed to the policy of the Companies Act. After making provision for what was termed Directors' calls the following proviso was added :—"Provided always that in the event of a larger sum being required for the purpose of working the mines on the property of the Company over and above the call which the Directors are authorized to make on the property of the Company it shall be lawful for the shareholders at any general or special general meeting to make such further call or calls as the majority of shareholders at such meeting may think proper." It being a Company limited by shares the liability was limited, but in the face of this most extraordinary provision what was the liability? The general limitation of the Company was to be by shares, and the proprietors were not liable for more than the amount of the shares; yet here was a power given to call up money which was really unlimited. True, it was not in the hands of the Directors, but of a majority of the shareholders; still it was a most tyrannical majority. How was it a limited Company when the majority could call up an unlimited amount? This being the state of things, after a call was made, Mr. Wood, who held shares to a considerable amount, wishing to get rid of his liability, made a transfer of his interest to Mr. Moule, and sent it down for the purpose of it being registered, the act of registration being essential to its legal effect. But the Directors refused to register it because under the articles they were not obliged to register any transfer if the transferor was in the debt of the Company; and he was in the debt of the Company if the contention could be maintained that the call was properly made. If not, then the whole question fell to the ground. There were several points urged, and among them was one made by *Mr. Nesbit*, on behalf of Mr. Wood, that even under the words of the articles the Directors could only call up such sums of money as might be required to work the mines of the Company, and the call in this instance was not for the purpose of working the Company's property, but to pay a debt. This seems to me to be altogether alien to the object of the Act. If the Company was in debt there was process provided for winding up the Company. I

do not think that such a power as the Company used was contemplated by the Act; but even if it was, this was not a proper exercise of it. Then there was another view of the case which was still stronger, and it was the point on which I base my decision, arising as it does from the construction of the Act itself. In this Statute, which was adapted from the English Act, and which was in fact a whole code of laws on the subject, it appeared that the signing of the memorandum produced what at one time would have been thought a magical effect. It formed the Company. It was the leading instrument, and the articles of association were subordinate to the memorandum. The Legislature had shown their appreciation of this in the twelfth section, which said, "Any Company limited by shares, if authorized to do so by its regulations as originally framed or as altered by special resolution in manner hereafter mentioned, may so far modify the condition contained in its memorandum of association as to increase its capital." How? "By the issue of new shares of such amount as may be thought expedient or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but save, as aforesaid, no alteration shall be made by any Company in the conditions contained in its memorandum of association." So the condition provided in the memorandum of association that this was to be limited and bound by shares, and although even if the articles would bear the construction put on them by *Mr. Ingleby*, still there would be this difficulty: that there could be no alteration made in the conditions of the memorandum except such as were particularly mentioned in section 12, and the present case did not come under any one of these exceptions. Holding these views I feel I must declare that the whole of the proceedings of the Directors were *extra vires*, and the register of the Company must be rectified by the name of Mr. Moule being substituted for that of Mr. Wood, with costs against the Company.

19 AUGUST, 16 SEPTEMBER, 1878, AND 23 JUNE, 1879.

WHITE v. MULES.

LOCAL COURTS ACT, 1861.—*Set off*—Res judicata—*Appeal.*

In an action in a Local Court for damages for conversion of a buggy, the defendant pleaded that the matter had been already adjudicated upon, and, in support of that plea, put in the proceedings in a former action in the same court, between the same parties, in which the present plaintiff, then defendant, pleaded, amongst other things, an informal plea of set-off, whereby he claimed from the now defendant "Any amount or balance that might be found due to the defendant upon his (the plaintiff's) said claim, and the amounts therein credited by him to the plaintiff, according to the particulars referred to in such claim," which particulars contained a credit in favour of the now plaintiff of £25 for a "buggy purchased by White."

The buggy referred to was the buggy in dispute in the present action, but the Court below found that the item of £25 in respect of same had not, in fact, been taken into account in the former action, and found a verdict for the plaintiff.

Held *(on appeal)—That the present plaintiff was not under the circumstances estopped from denying that the matter had been adjudicated upon, and that the verdict must stand.*

Semble.—*The defendant has an appeal in all cases where the claim exceeds £30, though the amount in dispute is less than that amount.*

RULE for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that the matter in dispute had been already enquired into, and adjudicated upon.

The action, which was tried in the Local Court of Adelaide, was for conversion of a buggy, and the defence, so far as the same is material to this report, was as stated in the head-note.

At the trial a verdict was entered for the plaintiff for £25, the claim being £35.

The facts of the case are fully stated in the judgment.

Barlow having, on the 19th August, obtained a rule *nisi*, as above, now moved that the same be made absolute.

Downer, Q.C., showed cause. There is no appeal in the case. The claim is for £35, but the amount *bonâ fide* in dispute was under £30, according to the plaintiff's own evidence—

Bank of South Australia v. *Hulbert*, 11 S.A.L.R., 60.

(WAY, C.J.—But where a plaintiff claims a larger amount than the verdict gives him, the defendant has the right of appeal.) It must be an actual *bonâ fide* dispute between the parties that must give the appeal. If there were conversion then it would not be a matter of set-off in the previous action. (WAY, C.J.—You led evidence to show that the damage done was over £35. I think it is clearly an appealable case. It appears to me that the questions for consideration are these :—First, whether the claim for £25 in respect of the sale of the buggy, and the verdict following is conclusive evidence that it was a sale ; and, secondly, whether any evidence was led for the purpose of showing that that particular item was abandoned in the course of the case.) There was no proper plea of set-off in the former action. Section 75, Local Courts Act, provides the mode in which a defendant may avail himself of a set-off. And the proviso of Section 87 requires that in order to claim the set-off he must file the particulars of the same action. Parties pleading a set-off have to file particulars, and if none are filed they are not allowed to give evidence. The effect of the defendant's plea of set-off is that he claims to recover from the plaintiff such items of the particulars of the set-off as are properly the subject of the set-off. He does not offer any evidence respecting the item of £25, for he knows it is a matter of conversion. It was not one of the items which was a proper subject of set-off. The effect of what we say is this—We look at the particulars of your claim and find we do not owe you anything, but we claim such of the items you have thought proper to credit us with as we can lawfully set-off. As to the £25 item, the buggy was never sold by White to Mules. After a great deal of litigation over partnership concerns and the conversion of this buggy, the plaintiff was asked if he would take £25 for it, and he said he would if he received it at once. (WAY, C.J.—That would not make it the less a sale. Still

there is the finding of the Court that it was not a sale. I think, however, it would be a subject of set-off.) The damages remained unliquidated. We agreed to waive the tort and take the money for damages, provided it was paid at once. If there was a sale it was a sale for £25, and that would render the matter not appealable. In Superior Courts the question of what was in dispute can only be proved by the record; but the pleadings in the Local Court show nothing. Lastly, the buggy never has been paid for, and substantial justice has been done.

Barlow, in support of the rule.—The Court cannot rely on the report of the Special Magistrate, and his notes of *Mr. Baker's* argument in the former action show distinctly that the matter was debated in the former action. The matter having been in issue in the former action, White is stopped from raising the same question again—

Henderson v. *Henderson*, 3 Hare, 115.

Mr. Downer might, at that trial, have asked to withdraw the plea of set-off, but not having done so he conclusively bound himself by the verdict of the Court—

Eastmure v. *Lawes*, 5 Bing. N.C., 444
Lockyer v. *Ferryman*, L.R., 2 App. Cas., 519
Flitters v. *Allfrey*, L.R. 10 C.P. 29.

(WAY, C.J.—The report of the Special Magistrate here is that it was not the same matter that was tried.) The Special Magistrate states that the buggy is the same buggy as that for which Mr. White was credited with £25 in the first action, and the identity of the subject-matter being established the *onus* of proof lies on the present plaintiff to show that the causes of action are different. Where it is possible for two causes of action to be the same the plaintiff must show that they are different, and he is bound to put it beyond all doubt—

Taylor on Evidence, 7th ed., sec. 1,701, citing *Lord Bagot* v. *Williams*, 3 B. and C., 239, and *Seddon* v. *Tutop*, 6 T.R., 609.

There can be no doubt it was a sale, because this appears in the evidence of Mr. Baker, and it is uncontradicted. Mr. Emerson himself writes a letter several months afterwards asking for cheque for £25, the price of the buggy. (Letter read.) But supposing it was not a sale. The form of the action would really make no matter if the matter involved in the decision in the former case was substantially the same as that in dispute in the second action—

The Queen v. *Hartington*, Middle Quarter (Township), 24 L.J., M.C. 98.

The credit of £25 to White in the former action was an item essential to the judgment in it. According to White's own pleadings, he has shown that he has substantially got that £25, for he accepted the crediting of it. Therefore there is no question of substantial justice arising out of the case. As to the right of appeal—

Hooper v. *McCoy*, 4, S. A. L.R., 62.

Cur. ad. vult.

23 June, 1879—

WAY, C.J., now delivered judgment as follows:—This is an appeal from the Local Court of Adelaide against a verdict for the plaintiff in an action to recover damages for the conversion of a buggy. The ground of defence material to this appeal was, that "the plaintiff's claim had been enquired into by a Court of competent jurisdiction, and adjudicated upon." The judgment referred to in the defence was the verdict in a previous action in the same Court, by the respondent against the appellant, in which £100 was claimed in several items, one of which was a balance, upon a statement of account between the parties, annexed to the particulars of claim. In this account there was a credit to the appellant of £25 for a "buggy purchased by White" (the respondent), and admitted to be the same buggy as is the subject of this action. One of the grounds of defence was an informal set-off, claiming from the

plaintiff "any amount or balance that might be found due to the defendant upon his said claim, and the amounts therein credited by him to the plaintiff, according to the particulars referred to in such claim." In that action there was a verdict for the defendant (now respondent), and the contention of the appellant is, that the defence above set out amounted to a set-off for the price of the buggy referred to in both actions; that the verdict for the defendant (now respondent) in the first action was an adjudication that he had been successful in establishing his right to the price of the buggy, and that he was not entitled to maintain the second action for the conversion of an article, the price of which he had recovered in the first. The argument for the appellant was mainly founded on the following passage from the judgment in *Henderson* v. *Henderson*, 3 Hare, 115, "where a given matter becomes the subject of litigation and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time." In order to apply that passage to this appeal, it is necessary to understand the words "subject of litigation." According to *Mr. Barlow*, they include everything which appeared in the particulars of demand, or memorandum of defence, in the first action, and, after verdict, it must be taken that everything which might have been agitated at the trial was actually adjudicated upon. I cannot concur with him in this argument. Under the defence of *res judicata* the defendant in the words of his own plea had to prove "that the plaintiff's claim had been enquired into and adjudicated upon." In proving that the buggy in question was included

in the particulars of claim, and in the memorandum of defence, he merely shows that its ownership, or its price, was a matter which either party could call upon the Court to decide. It remained in the option of the parties to bring, or not to bring it forward at the trial as a "subject of litigation." And whenever no formal record can be drawn up, or where the form of the record is not conclusive, parol evidence is admissible to identify and describe what was in dispute, and what was decided in the action in which judgment was given. (See *Seddon* v. *Tutop*, 6 T.R., 607 ; *Thorpe* v. *Cooper*, 5 Bing, at p. 129 ; *Eastmure* v. *Laws*, 5 Bing, N.C., 444 ; 8 L.J., C.P., 236 ; *Bagot* v. *Williams*, 3 B. & C., 239 ; *Hadley* v. *Green*, 2 Tyr., 390 ; *Preston* v. *Peake*, El., Bl., & El., 336 ; and *Flitters* v. *Allfrey*, L.R., 10 C.P., 29.) In the last-mentioned case, at p. 38, Grove enquires—"Supposing three or more defences are set up and the County Court Judge gives judgment for the plaintiff, without assigning any reasons, would the mere production of the record conclusively show, that *all* the matters raised before the Judge were decided against the defendant ?" At the trial of the present case there was conflicting evidence as to whether or not the ownership of the buggy in question was litigated at the trial of the former action. The Court below by their verdict have found that it was not ; and the learned S.M., who presided at both trialsr, eports to the same effect. This decision on the facts we have no jurisdiction to review, and the rule for a new trial will be discharged.

Rule discharged with costs.

28 MAY, 18, 25 AND 27 JUNE, 1877.

GILES v. WOOLDRIDGE.

PARTNERSHIP.—Injunction—Interim Order.

Where there is a reasonable probability, on the facts adduced by the plaintiff, of his establishing a case of partnership, the Court will grant an injunction to restrain the defendant until the hearing from parting with the assets of the alleged partnership.

Principles on which interlocutory injunctions granted discussed.

THE COURT *will discourage applications to discharge interim orders which have only a short time to run.*

MOTION by the plaintiff for an injunction to restrain the defendant until the hearing, from selling certain sheep runs, and by the defendant to discharge an interim order, obtained by the plaintiff, restraining the defendant from selling the same property.

The suit was for a dissolution of partnership, and an account of the partnership assets.

In November, 1872, the plaintiff advanced £3,500 to the defendant to enable him to carry on certain runs, and continued to make further advances until March, 1876, when the defendant purchased the Courtabie run, with 15,000 sheep, the purchase money being paid by cash and bills, the cash being paid, and the bills drawn and endorsed by the plaintiff, and accepted by the defendant, and the leases of the runs being taken out in the joint names of the plaintiff and defendant.

The plaintiff alleged that, at the time of this purchase, it was agreed between him and the defendant, that the newly-acquired runs, and certain other runs, should be held by the plaintiff and defendant as partners, the plaintiff to be indited in the partnership accounts with, and to be allowed interest on the money advanced by him.

The defendant denied that there was any agreement for a partnership, and alleged that the money, amounting in all to £22,000, paid by the plaintiff to or for him, was so paid by way of loan, and that the leases were taken in the joint names by way of security.

The defendant, who put in, with reference to the original advance of £3,500, an agreement for sale and purchase by him of the Courtabie run in his own name, and an unregistered mortgage to the plaintiff dated July 1, 1873, of certain station property to secure the amount of the first advance. When the bills given in respect of the Courtabie run became due, the plaintiff and defendant waited on the Manager of the National Bank, representing themselves as partners, and an account was opened in the names of "Giles & Wooldridge."

Letters from the plaintiff to the defendant assuming the existence of a partnership, and reminding the defendant of an alleged promise to have a proper deed of partnership drawn up, were put in, with the defendant's replies, in which he made no direct reference to the question of a partnership, but confined himself to accounts of the condition of the runs, &c.

At the time of the institution of the suit the defendant had advertised for sale one of the runs forming part of the alleged partnership assets, and refused to postpone such sale, although no loss would have accrued by delay, as runs were rising.

The plaintiff applied for and obtained an interim order to restrain the defendant from so selling, setting out in his affidavit in support of such application, the facts of the advances prior to 1876, and of the alleged agreement then entered into for a partnership, but making no mention of the mortgage of July, 1873, or of the agreement for sale and purchase of the Courtabie run in March, 1876. The plaintiff, in fact, denied all knowledge of the existence of these documents, and put in a letter from the defendant to him written in 1876, in which the defendant stated, "It is true you have had no absolute mortgage as security, but I have frequently tendered

you the leases of my runs in the Gawler Ranges." Mr. Wadham, in his affidavit, swore that he had prepared the agreement of the 23rd November, 1872, as plaintiff's agent, but it appeared that there was a private arrangement between him and the defendant to share in the benefits of that agreement, and the defendant, in cross-examination, swore that that agreement was prepared by himself and in his own handwriting.

June 25—

Symon, for the plaintiff, cited—

Kerr on Injunctions, 628
Semple v. *The London and Birmingham Railway Co.*, 1 Railway Cases, 493
The Attorney-General v. *The Corporation of Liverpool*, 1 Myl. & Cr., 209
Brown v. *Newhall*, 2 Myl. & Cr., 571
Kerr 620, and 2 Joyce, 1,305
Fuller v. *Taylor*, 32 L.J., N.S., 376
Tullett v. *Armstrong*, 4 Myl. & Cr., 377
Coleman v. *West Hartlepool Railway Co.*, 3 L.T., N.S., 847 4 L.T., N. S., 605
Cory v. *Yarmouth Railway Co.*, 3 Hare, 603
Skinners Company v. *Irish Society*, 1 Myl. & Cr., 165
Pyecroft v. *Pyecroft*, 2 S. & D., 326
Robinson v. *Anderson*, 20 Beav., 98
Webster v. *Bray*, 7 Hare, 159
McGregor v. *Bainbrig*, ibid, 164
Waugh v. *Carver*, Smith's L.C., 922 (7th ed.), Lindley, (3rd ed.), 93
Peacock v. *Peacock*, 2 Camp., 45
Nowell v. *Nowell*, L.R., 7 Eq., 538.

Belt and *Wigley*, for the defendant, cited—

2 Mont., D. and D. Reports, 339 to 343
Clifton v. *Robertson*, 16 Beav., 355.

Symon, in reply.

STOW, J.—The question is, not whether the plaintiff's case is absolutely proved or what decree he is entitled to, nor is the question whether the properties are at stake. The question on the application for an interlocutory injunction is, whether there is sufficient ground to justify the belief that the plaintiff has a fair case; and, even were the whole of the plaintiff's allegations in making out his case absolutely denied—that is, denied in general terms by the defendant—yet, if there were independent circumstances tending to support the case for the plaintiff, the authorities would show that the injunction may be granted. In this case, the first thing that presents itself is the fact, that the plaintiff made advances to the defendant, from time to time, of considerable amount, by means of which defendant acquired certain runs and property, agreeing, at the instance of the defendant, to pay the whole purchase-money for the run called Courtabie, on the condition that he was to be a partner in that sale, and in the other runs which had been acquired; the money advances to be taken as capital, and interest to be allowed. This the defendant denies; and, in so doing, says that the only agreement was, that this money should be lent, but he does not state upon what terms; nor does it appear that the plaintiff was to have any security, except the leases in the joint names of the newly-acquired country; and, although 15,000 sheep were bought with this land, there was no suggestion on the part of the defendant that there was any security over these sheep. Looking at the statement of the plaintiff on the one hand, and that of the defendant on the other, it certainly appears to me a most singular circumstance, if the defendant's tale is true, that there was no agreement for partnership, and only an agreement for a loan; that nothing should be said as to the terms of the loan, or as to the security, beyond the fact stated by the defendant, that the leases were to be taken as such—made out in their joint names. Inasmuch as it is not necessary for me to finally decide the question now, but only to say that the plaintiff has a fair claim to prevent the property from being dissipated, it would seem that, on principle and authority, the injunction ought to go, unless some

reason is advanced to show that the plaintiff's case is not a true one. Looking at the probabilities of the case, it is very singular to say the least of it, that this particular form of security should have been taken. I have heard of security having been given on leases, but it is always necessary that an absolute transfer in terms should be made to the person who advances the loan, which in Equity would amount to a mortgage. A transfer in the name of two, the lender and the borrower, seems a singular way of giving security. It is far more consistent to suppose that there was to be a partnership. When the plaintiff wrote to the defendant two letters, claiming to be his partner, not exactly in terms, but assuming himself to be defendant's partner, and referring to the partnership deed promised by defendant—when he claimed the performance of that promise, defendant wrote a very evasive letter in reply, in which he told the plaintiff what he was doing on the runs, and, although acknowledging the receipt of plaintiff's letters, did not approach any of the topics they dwelt upon. This might be urged as a very strong reason for believing that the defendant knew he was a partner of the plaintiff, and wished to avoid giving an answer one way or another. Turning next to the memorandum of agreement, how can I say that there is not a sufficient case in favour of the plaintiff as against the statement of the defendant? Then there is very strong evidence that the defendant went with the plaintiff to the National Bank, and saw Mr. Wilkinson, the Manager, when a conversation took place relative to the partnership, and plaintiff openly stated that he was going into partnership with defendant. Wooldridge's affidavit certainly tended to throw great doubt on his memory, to say the least of it. He says that which is altogether inconsistent with the facts admitted by him subsequently in his cross-examination, and as proved by evidence to which there is no answer. Instead of the bills being taken up, as sworn in his affidavit, against his consent, he went himself with the plaintiff, and had the account made out. It was made out in the names of "Giles & Wooldridge"—another strong piece of evidence against him—and he went there with plaintiff, and the amount to be paid was settled in his presence. There being a dispute about one

day's interest which plaintiff would not pay, Wooldridge drew a cheque for it himself. All these circumstances would afford very strong reasons for believing the plaintiff rather than the defendant, even if the other parts of the evidence did not support the plaintiff's testimony. There therefore appears to me sufficient reason for believing there is a probability, on the facts at present disclosed, of the plaintiff establishing a case of partnership. If it were shown that the contract which was entered into was one, the essence of which was that there should be a partnership, not only with reference to Courtabie, but also with regard to the Gums Station, which the defendant threatens to sell, then it seems to me that the injunction ought to go to the hearing. As to the motion to discharge the interim order, I should be disposed, where it has only a few days more to run—unless there is some reason to suppose that irremediable injury would be sustained by defendant—to discourage the application to discharge. It appears to me only to increase the expenses unnecessarily. With reference to the alleged suppression of material facts—the agreement and mortgage—it seemed to me that these documents relate to what took place before the alleged agreement of partnership, and I do not consider that it was "material." Although forgetting facts was no excuse, yet here there is sufficient reason for supposing that the plaintiff did not know of the existence of the mortgage. Considering the relation in which Wadham stood in the matter, I should not be disposed to act on his evidence that the mortgage was shown to the plaintiff. The sale-note referred to by the defendant's counsel I consider has nothing whatever to do with the issue, and the same remark applies to the alleged misstatement. Upon these grounds I am of opinion that the injunction should be continued until the hearing, and therefore the plaintiff's motion for injunction will be granted, costs to be costs in the cause; but the defendant's motion to discharge the interim order will be dismissed with costs.

Injunction granted, and motion for the discharge of the interim order dismissed with costs.

29 APRIL, 3 AND 6 MAY, AND 24 JULY, 1879.

RUTHERFORD v. DARWENT.

ADMINISTRATION.—Trustees—Wilful default—Liability for money received by co-trustees—Interest—Costs.

A Testator, by his will, devised all his property to three trustees, one of whom had, during the testator's lifetime, had the management of his affairs.

After the testator's death D was still allowed by his co-trustees to continue to manage the affairs of the estate, without any interference on the part of such co-trustees.

The will contained the usual trustees' indemnity clause, exonerating each trustee from liability for the acts of his co-trustees, and for moneys received by such co-trustees, or either of them.

D having received and misapplied certain moneys belonging to the estate became insolvent, and the co-trustees proved in his estate, and received dividends in respect of the moneys so misapplied.

Held—*That in a suit for administration of the estate of the testator, in which there was no charge of wilful default, the co-trustees having, under the above circumstances, constituted D their agent, must bring into Court the moneys misapplied by D, with interest, from the time when the same became available for distribution or investment, but that the trustees were not disentitled by their conduct to the costs of suit.*

THE suit was for administration of the estate of James Hunter, deceased.

The testator by his will devised and bequeathed his estate and effects to three trustees, Messrs. Darwent, Fergusson, and Clark.

For some time prior to his death the testator had entrusted the management of his affairs to Darwent, and after his death the other trustees continued to leave the sole management of the affairs of the estate to him.

Darwent became insolvent, having misapplied various moneys received by him on account of the estate, amounting in all to

£1,398 14s., for which amount the co-trustees proved in Darwent's estate, receiving therein dividends to the extent of £145.

The will contained the usual clause exonerating each trustee from liability for the defaults of the others, and for moneys received by the others, or either of them.

The bill contained no charge of wilful default against the trustees.

Belt and *Hardy*, for the plaintiff, cited—

Stiles v. *Guy*, 1 M. & G., 428
Booth v. *Booth*, 1 Beav., 125
Lincoln v. *Wright*, 4 Beav., 427
Fenwick v. *Greenwell*, 11 Beav., 412
Joy v. *Campbell*, 1 S. & L., 341
Langford v. *Gascoyne*, 11 Ves., 335.

Symon and *Ayers*, for certain beneficiaires under the will, cited—

Daniel's Practice (4th ed.), 1250-51
Fleming v. *East*, Kay, app., 52
Pattenden v. *Hobson*, 22 L.J., N.S., 697
Houghton v. *Brocklehurst*, 29 Beav., 504-512
Lewin (6th ed.), 222
Toplis v. *Hurrell*, 19 Beav., 423
Lewin (6th ed.), 240
Williams on Executors (7th ed.), 1830 (where the case of *Doyle* v. *Blake* was quoted and followed)
Lees v. *Sanderson*, 4 Simons, 28
Candler v. *Tillet*, 22 Beav., 257
Underwood v. *Stevens*, 1 Mer., 712
Lewin (6th ed.), 234
Mendes v. *Guedalla*, 2 J. and H., 259
Williams on Executors (7th ed.), 1809-10
Stone v. *Stone*, L.R., 5 Ch., 74
Walker (defendant) 5 Russell, 7
Stickney v. *Sewell*, 1 M & C., 8

Hopwood v. *Parkin*, 22 L.T., N.S., 772
Sutton v. *Wilders*, 12 L.R., Eq. Ca., 383
Davenport v. *Stafford*, 14 Beav., 319
Bush v. *Watkins*, 14 Beav., 33
Howard v. *Chaffers*, 9 Jur., N.S., 634; 11 W.R., 515
Lewin (6th ed.), 98
Daniels (4th ed.), 1251
Smith's Practice, 1048
Seton on Decrees, 41
Goodyere v. *Lake*, Amb., 584
Hollingsworth v. *Shakeshaft*, 14 Beav., 492
Turner v. *Turner*, 1, J. & W., 39
Johnson v. *Prendergast*, 28 Beav., 470
Davenport v. *Stafford* (ubi supra)
Fry v. *Fry*, 10 Jur., N.S., 983
Williams on Executors (7th ed.), 1844, 1851
Seton, 765, citing *Tickner* v. *Smith*, 3 Sm. & G., 42.

Ingleby, Q.C., and *Downer, Q.C.*, for the defendant trustees, cited—

Partington v. *Reynolds*, 4 Jur., N.S., 200
Candler v. *Tillett* (ubi supra)
Weymouth v. *Boyer*, 1 Ves. Jun., 416
Storey's Equity Pleadings, par. 423.

Scott, for other beneficiaries, cited—

Lewin, 6th ed., 184
2 Williams on Executors (7th ed.), 1827-8
Booth v. *Booth*, 1 Beav., 125
Hanbury v. *Curtain*, 3 Simon, O.S., 265
Curtis v. *Mason*, 12 L.J., N.S., Ch., 442
Bone v. *Cook*, McL., 168
Chambers v. *Minchin*, 7 Ves., Jun., 186
Williams on Executors (7th ed.), 2040
Hutchinson v. *Freeman*, 4 M. & C., 490

Shuttleworth v. *Howarth*, 1 Cr. & Ph., 228
Franklin v. *Frith and Others*, 3 Brown's Chancery Ca., 108
Seers v. *Hind*, 1 Ves., Jun., 294
Rocke v. *Hart*, 11 Ves., Jun., 61
Pearce v. *Green*, 1 J. & W., 135.

Belt, in reply.

Symon, in reply.

Cur. adv. vult.

24 July, 1879—

WAY, C.J., now delivered judgment herein as follows:—The further consideration of this cause came on before me, sitting for the Primary Judge, on two certificates of the Master—the first confirmed on the 6th July, 1875 (hereafter referred to as "the first certificate"), and the second confirmed on the 22nd October, 1877 (hereafter referred to as "the certificate.") On behalf of the plaintiff and the legatees it is claimed that Messrs. Fergusson and Clark (whom I shall call "the defendants"—their co-defendant, Mr. Darwent, being dead) are accountable for all the moneys which are shown by the certificate to have been received by themselves or Darwent, with interest on the amount not paid into Court, computed with rests, and that they ought to be deprived of the costs of the suit. The defendants dispute their liability to the moneys received by Darwent or to interest, and they claim their costs. 1. The moneys which the 10th, 14th, and 16th paragraphs of the certificate show were received by the defendants as trustees or executors, and upon the sale of real estate, together amounting to £1,375 2s. 8d., will of course have to be brought into Court. In this suit, however, in which the bill neither alleges nor prays relief for wilful default, and in which the common decree only has been made, I cannot order the defendants to pay moneys which the certificate shows to have been received not by them but by Darwent—at least without

further investigation. And it is clear also that I cannot at this stage of the proceedings, by directing further enquiries, enlarge the scope of the decree so as to change it into a decree for wilful default. On behalf of the letagees, except the plaintiff, it was urged that an order should be made that the defendants bring into Court the sum of £1,398 14s., for which they proved on Darwent's estate in insolvency as the loss occasioned by their neglect of duty as executors and trustees. To do this would in effect be charging the defendants with wilful default in this suit, which, as I have pointed out, cannot be done, and would be wresting a proper precaution taken by them to save the trust funds from a total loss into an admission of liability for the moneys they sought to save. On the other hand, I am by no means satisfied that complete justice cannot be done in the present instance without recourse to proceedings for wilful default. The 15th paragraph of the certicate contains the following passage, explaining the way in which Darwent retained in his hands a balance of £213 14s. 6d. out of the proceeds of the sale of real estate. "The said defendant, William Fergusson, in his evidence stated that the defendant Darwent had the management of the estate during the testator's lifetime; that the said defendant Darwent received and paid all the moneys up to the time of said defendant Darwent's death; the said defendant Darwent's co-trustees did not receive or pay any money on account of the estate; that the said defendant Darwent being the agent of the testator in his lifetime was the reason his co-trustees left the mangement in his hands, and that the defendant Fergusson knew that the defendant Darwent received the money for the land, and that defendant Darwent never furnished his co-trustees with any accounts, and that said defendant Fergusson never asked the defendant Darwent for his accounts, and that up to the time of the death of defendant Darwent said defendant Darwent managed all money matters and the estate entirely." It thus appears from Mr. Fergusson's statement that the defendants finding that Darwent had acted as agent for the testator, continued his agency without supervision, and that the moneys which he was thus enabled to receive were not invested pursuant to the direction contained in the will, and have conse-

quently been lost to the estate. And that being the fact, the defendants would have the same responsibility for Darwent's acts as if he had not been a trustee. His receipts would be their receipts, and the indemnity clause in the will would not exempt them from having to account for the moneys which they received, not by their own hands it is true, but through their agent, and which they allowed him to retain instead of investing. Such a liability as this, amounting to a constructive receipt, would, if established not require a decree for wilful default to enforce it, and would be covered by the decree in this suit. Still I cannot treat Darwent's receipts as the constructive receipts of the defendants on the certificate and nothing further. Mr. Fergusson's statement is reported in the certificate not as a fact found by the Master, but only as the evidence of one of the defendants. So far as Mr. Fergusson is concerned there may be some explanation to qualify it, and standing alone it ought not to bind his co-trustee Mr. Clark. At the same time there is at least sufficient to call for a further investigation. I shall, therefore direct an inquiry as to whether there was a constructive receipt by the defendants, or either of them jointly with Darwent, of the proceeds of the sale mentioned in paragraph 15th of the certificate. The Master will report if Darwent was the defendants' agent as to the estate, and what authorities and discretions (if any) were confided to him in the management, collection, realization, and investment of the estate, and if they signed the conveyances and receipts for the purchase-money, and what precautions they took to secure its investment. This enquiry will not be limited to the proceeds of the real estate, but will extend to the other moneys stated in the report to have been received by Darwent, and the Master will report upon what dates the moneys were received and ought to have been invested. These directions make it needless for me to consider the necessity of a motion for leave to file a supplemental bill in the nature of a bill of review with a view of charging the defendants with wilful default; and it would also be premature to discuss whether leave should be given to proceed with the suit of *Hill* v. *Darwent* charging wilful default, proceedings in which were stayed pending this suit. 2. With respect to interest,

there is no doubt that it can be ordered upon further consideration under the common decree (2 Daniel's Ch. Pr., 1231). I shall not order interest to be computed against the defendants with rests, as there was no suggestion in the argument that the directions in the will for accumulation of children's surplus income applied to the shares of the legatees, or that the defendants had used the trust money in their own business or for their own profit. There certainly appears to be no escape for them from simple interest. The personality was ample for payment of the debts, which were in fact paid by Darwent. I am at a loss to understand why, in the face of an express direction in the will for the investment of the trust funds, they have been retained all these years uninvested. It is true that during a long period this suit has been pending, but that is no excuse for a breach of trust, as the consent of the Court could have been obtained at any time to a proper investment. The defendants will pay interest on the amounts in their hands from the dates of receipt or their being available for investment. If these dates are not agreed, there must be an inquiry to ascertain them. Interest will not be charged on the amounts received, or income to which the representatives of Samuel and Janet Hunter are respectively entitled (see *Blogg* v. *Johnson*, L.R., 2 Ch. Ap., 225). 3. I do not agree with the counsel for the legatees, that the defendants should be deprived of their costs. No breach of faith or dishonest conduct is imputed to them. The faults alleged against them are—first, that they confided in Mr. Darwent too much; and secondly, that they failed to keep the trust funds invested. If the first be proved, they, and not the legatees, will have to bear the loss; in the second, have to pay the interest. Neither is a fraud for depriving them of their costs in a suit in which they are not charged with misconduct, and which was necessary in order to ascertain the legatees entitled under the will. The costs of all parties will therefore be taxed as between solicitor and client, and those of the legatees will be paid. The plaintiff's and defendants' costs will not be paid out until further order, and I shall not be inclined to authorize them until after compliance with the directions as to payment of the principal and interest moneys into Court; and finally, not until after the report upon the

enquiries which I have directed, the costs of which will be reserved. The plaintiff ought, I think, long ago to have obtained payment into Court of the moneys lying uninvested in the defendants' hands. 4. The defendants will also bring into Court the £145 received as dividends under Darwent's insolvency, but without prejudice to the legatees' claims against them personally in respect of the moneys received by Darwent. The fund in Court and the moneys to be brought in may be at once divided amongst the legatees in the shares mentioned in the certificate, after deducting the costs therefrom, as the £150 received under the insolvency should be ample to protect the plaintiff and defendants against the costs of the inquiries. The representatives of Samuel and Janet Hunter can also have their share of the dividends in insolvency, or the balance of the income received for them by Darwent. The further consideration will be adjourned, with liberty to apply.

On the suggestion of His Honor the various counsel for the parties agreed to waive the further enquiries directed to be taken, in order to save expense, and they consented to leave it to His Honor to fix as a matter of conscience, and not as a matter of law, the amount that should be paid in final settlement of the liability in respect of Darwent's receipts, and interest thereon. His Honor said he would make up the minutes on that basis and furnish the same to the Master, and if any difficulty arose the parties would have liberty to apply and speak to the minutes.

The following memorandum of the terms of the orders on further consideration as allotted by consent was afterwards drawn up: —1. Let Fergusson and Clark bring into Court the following moneys:—(Par. 10.) Received as trustees £106, as executions £178 10s. (Par. 14.) Balance of purchase-money realty, £972 16s. 8d. 2. Compute interest on the foregoing amounts at £8 per cent. per annum from the dates of their respectively received. 3. Let defendants also bring in the following amounts received by Joseph Darwent:—Proceeds realty, £213 14s. 6d.; proceeds personalty, £484 12s. 6d. 4. Tax the costs of all parties between solicitor and client, and pay out the foregoing amounts and interest

and the funds in Court and its accumulations to the beneficiaries in equal shares *per capita*. 5. Let defendants bring into Court the following amounts:—Received by them as income for Samuel Hunter, £12 15s.; in respect of Darwent's receipts of income for Samuel Hunter, £19 16s. These two amounts to be paid out to Samuel Hunter's representatives. 6. Let the defendants also bring in amount received by them as income for Janet Hunter, £103 1s.; in respect of Darwent's receipts of income to Janet Hunter, £153 6s.

APPENDIX.

28 MAY, 1878.

LEVI v. AYERS AND OTHERS.

On Appeal from decisions in this suit (reported in 10 *S. A. L. R. pp.* 140 *and* 211), *the Lords of the Judicial Committee of the Privy Council, on the 28th May,* 1878, *delivered the following judgment affirming the decision of the Court below, and dismissing the appeal with costs.*

THE questions to be determined in this case are raised by two appeals, which have been consolidated. One is an appeal from an order of the Supreme Court of South Australia in Equity, dated the 9th October, 1876, which affirmed an order of the Primary Judge of the same Court, dated the 29th August, 1876, allowing a demurrer put in by the defendants—Sir Henry Ayers, Robert Barr Smith, Thomas Giles, and Thomas Drury Smeaton—to the reamended bill of the plaintiff. The other is an appeal from an order of the said Primary Judge, dated the 19th December, 1876, by which, after disallowing the objection of the other defendants, William Selby Douglas and William Townsend, that they were improperly made parties to the suit, he allowed their demurrer to the reamended bill for want of equity. The case, therefore of all the defendants is now the same, the question being whether any case for equitable relief has been made against them, and that question must of course be determined upon the facts stated in the reamended bill. These facts may be shortly summarized as follows :—The New Zealand Banking Corporation, Limited, was a duly incorporated Company under the Imperial Statute known as the Companies Act, 1862. On the 2nd June, 1866, an order was made by the Court of Chancery for winding up that Company,

under which an official liquidator was appointed, and other proceedings were had in conformity with the Statute. At the date of the winding-up order, and for some time previously, the plaintiff, Frederic Levi, was the registered owner of 2,070 shares in this Banking Corporation Company, of which 1,125 were held by him as the nominee and trustee of the firm of Philip Levi and Company, out of whose assets £1 had been paid on each of such last-mentioned shares, the shares being accordingly treated as, and being, in fact, part of the partnership assets. The firm of Philip Levi and Company consisted of the plaintiff, Philip Levi, Edmund Levi, and Alfred Watts, and carried on the business of merchants, both in the City of London and at Adelaide, in South Australia, the business being managed in London by the plaintiff alone, and in South Australia by his three partners above named. In September, 1866, Philip Levi and Company became insolvent, and on the 17th of that month the three Australian partners executed a deed for the benefit of their creditors, purporting to be a deed made under the provisions of division 6 of the Colonial Insolvent Act, 1860. On the 23rd February, 1867, a similar deed was executed in the name of the plaintiff, under a power of attorney, dated the 1st December, 1866, which had been sent out by him from London for that purpose. The effect of the two deeds was to vest the joint assets of the firm and the separate estates of the respective partners therein in the defendants—Sir Henry Ayers, William Selby Douglas, Robert Barr Smith, and William Townsend —as trustees for the creditors; and in the schedule of the property assigned, which was annexed to each deed, were included the before-mentioned 1,125 shares in the New Zealand Banking Corporation, estimated at the value of £1,090 2s. 5d. The bill admitted that these deeds were duly executed, and were in all respects valid and legal deeds in conformity with the Colonial Insolvent Act, 1860, with respect to arrangements between debtors and creditors by deed, except as regards both in so far as the power to trustees to retire, and of appointing new trustees, contained in such deeds might not be authorized by the Act; and as regards the latter deed in so far as such deed might not be valid as a deed under the Act, by reason of its having been executed under a power of attorney, or by reason of the fact that the said Frederic Levi was resident and domiciled out of South Australia. The

bill also suggested a further objection to the later deed, which was probably intended to apply to both, viz., that the power to appoint new trustees could not be exercised consistently with the Act without the sanction and approval of the Court of Insolvency or the creditors of the insolvents. The power of the trustees to retire and to appoint new trustees was exercised on several occasions, and, as the bill alleges, without the express "sanction or approval of the Court of Insolvency or of the creditors of the parties to the said trust deeds or either of them." The general result was that two of the original trustees, the defendants William Selby Douglas and William Townsend, retired, and the defendants, Thomas Giles and Thomas Drury Smeaton, became new trustees under both deeds. The 23rd paragraph of the bill, upon which much stress has been laid, after stating that at the respective times when the two creditors' deeds were executed the trustees knew that the Banking Corporation was in a state of liquidation and that the official liquidator was pressing the firm of Philip Levi and Co. in connection with certain credits which that firm had obtained from the Corporation proceeds thus:—"It was at the commencement of the liquidation anticipated that after payment of all the creditors in full there would be a considerable sum divisible amongst the shareholders. The said shares were consequently included in the said trust deed as a valuable item of property which the debtors were bound to specify and to assign over for the benefit of the creditors. The second schedules to both the aforesaid deeds were respectively prepared, so far as the London assets were concerned, from a statement of affairs brought out by Mr. Edmund Levi, who left London for Adelaide in the month of May, 1866, and the defendants never raised any objection to the shares being comprised in the said deeds; and the plaintiff charges that under the circumstances they must be deemed in equity to have accepted, and that they did in fact accept, the said shares as part of the assets of the said partnership, which they were bound to realize and dispose of for the benefit of the joint creditors, and that they cannot now repudiate any liability which has subsequently arisen in respect thereof." Whatever may have been the anticipated result of the liquidation of the New Zealand Banking Corporation in 1866 the actual result was far from favourable; the plaintiff was placed on the list of contributories and has become personally liable, as

between himself and the official liquidator, to pay calls on the 1,125 shares to the amount of £6,187 10s. 10d., with interest running from different dates, and also to pay any future calls that may be made upon him as a contributory. The shares are still standing in the plaintiff's name on the register of the members of the Company. The New Zealand Banking Corporation, Limited, was not included in the schedules to the trust deeds as a creditor in respect of the calls, and has not assented to the deeds, or been admitted to prove as a creditor thereunder, and the plaintiff, "except so far as he is protected, if at all, by the trust deed of the 23rd February, 1867, continues liable to satisfy the said calls." The 37th paragraph of the bill states that the "writ is instituted with the authority and by the directions of the official liquidator of the Banking Corporation for the benefit of that Company." On those facts the bill prayed:—1. For a declaration that the defendants as trustees of the joint estate of Philip Levi and Co. were liable out of such joint estate to pay the present arrears of calls and all interest thereon, and pay future calls that might be made in respect of the said 1,125 shares, and thereout to keep the plaintiff indemnified against all actions, suits, &c., for or in respect of the said shares or any of them, and an order for payment in accordance with such declarations; or 2. For a similar declaration in respect of the separate estate of the plaintiff, and an order for payment in accordance therewith; or 3. For a similar declaration and order in respect of the surplus of the joint estate after the payment thereout of the partnership creditors; or 4. Only in case the second deed should be held not to be a valid and subsisting deed, under Division 6 of the Insolvent Act, 1860, for a like declaration and order in respect of dividends upon the debt created in respect of the said shares, treating such debt as a debt proved, or provable, against the joint estate. The equity of the plaintiff, if any, against the trustees must be founded upon these two propositions, or one of them, viz.—1st. That the transferee of shares formed under the Companies Act, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against all liabilities in respect of them subsequent to the date of the transfer; 2nd. That a trustee whose name is on the register, though personally liable as a shareholder, is entitled to be indemnified by his *cestui que* trust. These propositions, as general rules, are indis-

putable. Their application, however, and particularly that of the first, to the present case, depends upon various considerations of greater or less nicety. In what way can the trustees be said to have become the transferee of these shares, taking the beneficial interest therof? Simply by having executed and acted under two deeds, in the nature of a *cessio bonorum*, for the benefit of creditors, which assigned that beneficial interest, together with all the other property of the insolvent debtors. That the law makes a distinction between persons taking an assignment of shares or the beneficial interest therein by way of contract, and under an ordinary deed, and the assignees of a bankrupt or insolvent who take his whole estate by operation of law, is clearly established. The reasons for the distinction are pointed out by Sir William GRANT in his judgment in the case of *Wilkins* v. *Fry* (1 Mer., 244), though the question in that particular case was whether the assignees of a bankrupt who had sold his leasehold property had a right, independently of positive stipulations, to require from their vendor an indemnity against the covenants in the lease. In *Turner* v. *Richardson* (7 East, 335) and other cases, it was treated as settled law that assignees in bankruptcy are not bound to accept a *damnosa hæreditas*, and that they have consequently an option to accept or to repudiate property which is or may be injurious to the estate. The substantial question, therefore, in this case is whether the trustees are to be treated as the assignees of shares under an ordinary deed, or as persons taking in the character and with only the rights and liabilities of assignees under a bankruptcy or an insolvency. It appears to their Lordships that in deciding this question they ought to look to the substance rather than to the form of the transaction; to the nature of the functions undertaken by the trustees rather than to the machinery by which those functions were created. By the Colonial Insolvent Act, 1860, Division 6, commencing at section 172, provisions are made with respect to arrangements by deed between debtors and their creditors; and it is enacted by that section that any debtor may, by deed containing the particulars, and executed and attested as thereinafter provided, convey and assign to trustees, his estate and effects for the benefit of his creditors. By section 179 every such deed is rendered binding and effectual in all respects upon the creditors who shall not have signed the deed as if they had duly signed the same, and vests in

the trustees the property, of whatever kind or wherever situate, of the debtor, including all debts due to him upon the trusts and for the purposes in and by such deed declared, and such trustees are authorized to recover the property and debts in their own names as trustees for the estate of the debtor in like manner as assignees in insolvency. Section 172 enacts that every such deed shall be executed by the debtor, and also by the trustees thereof, within seven days of such execution by the debtor, and by each of them in the presence of a practitioner of the Supreme Court, a Justice of the Peace for the said Province, or a clerk of a Local Court, and that each witness shall attest such deed, and specify the date on which the execution so attested was made. It was also enacted by section 174 that every such deed shall contain in a schedule annexed thereto, a true and particular account of all the property of the debtor, subject to certain exceptions not material in this case, and shall also contain in a like schedule the names of the several creditors of the debtor, and the amount due, or supposed to be due, to them respectively. Their Lordships entertain no doubt that trustees under trust deeds which fall strictly within the provisions of the Colonial Statute stand in respect of the point under consideration upon the same footing as assignees under a regular bankruptcy or insolvency, and have the same option of either accepting or repudiating such shares as are in question in this suit. It was, indeed, contended on behalf of the plaintiff, that the express declaration in the deeds that it should be lawful for the trustees to refuse to accept any lease, or agreement for a lease, or any agreement for the purchase of lands which the trustees should deem not to be beneficial to the creditors, impliedly restricted the trustees from refusing to accept shares, or any other description of property; but their Lordships are of opinion that it had no such effect. The declaration was introduced rather to limit the general right of refusal which the law would otherwise have allowed the trustees by requiring them to state such refusal in writing within fourteen days after being called upon to elect whether they would accept or refuse property of the description therein specified. A question, however, arises on the bill whether the two trust deeds in this case were deeds within the provisions of the sixth Division of the Insolvent Act, 1860. These deeds were framed with a view to the administration of the insolvents'

estates under the Statute, and were formally executed in accordance with its provisions. The estate has been so administered, and their Lordships are not prepared to say that any of the objections suggested by the bill, viz., the insertion of a power to allow the trustees to retire and to replace them by new trustees, the exercise of that power without the express sanction of the Insolvent Court or the domicile of the plaintiff, and the execution of his deed under his power of attorney—are any of them fatal to the character of the deeds as deeds under the sixth division of the Insolvent Act, 1860. But whatever might have been the weight of any of these objections if taken at the proper time by a non-assenting creditor, their Lordships agree with Mr. Justice GWYNNE in the conclusion that they cannot prevail when proceeding from the mouth of the plaintiff. They must therefore hold as between him and the trustees, that the latter had in respect of the shares the same option of acceptance or repudiation as would have belonged to ordinary assignees under a regular bankruptcy or insolvency. Have they then exercised that option by taking to the shares? Their execution of the deeds, their acceptance of the trusts, and general action under them do not of themselves constitute such a taking to or acceptance of this particular asset. The insolvent estate has never derived the slightest benefit from it, and could not have done so, since the shares have turned out to be worse than worthless, and are now treated as creating a liability instead of a benefit. The trustees have never done any special act in relation to them, and the legal title to them remains as it was before the execution of the deeds. The cause, however, comes on upon demurrer, and it is therefore necessary to consider the effect of the allegations in the 23rd paragraph of the bill, which has been already cited. Their Lordships agree with Mr. Justice GWYNNE that this paragraph imports not an allegation that the trustees did in point of fact accept the transfer of the shares, but merely the charge of a conclusion in equity from the facts stated in the bill—a conclusion which is erroneous if the trustees had the option which their Lordships have decided that they had. It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents that the assignees, taking the property for division amongst his creditors should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or

insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency. The subject was fully considered by Sir William GRANT in the case of *Wilkins* v. *Fry* above referred to. These considerations appear to their Lordships to be a sufficient answer to any claim of the plaintiff against the trustees for payment or indemnity out of the joint estate of Philip Levi & Co., or out of the separate estate of the plaintiff. The trustees have incurred no liability to indemnify the plaintiff out of the assets to be administered by them or otherwise. Their duty is to apply the assets in payment of the joint and separate creditors, and to hand over the surplus, if there be any (of which there is no proof), to the insolvents. The rights of the insolvents *inter se* cannot be dealt with in this suit. The official liquidator and the Company which he represents have in this suit no higher rights than the plaintiff, who states that he is suing for their benefit and under their authority. It is unnecessary to determine whether they could or could not have come in under the insolvency and entitled themselves to dividends on their claim out of either the joint or separate estate, because they have not so come in or sought to make the requisite proof. It appears therefore to their Lordships that the plaintiff's suit wholly fails, and they will humbly advise Her Majesty to affirm the orders under appeal and dismiss this appeal. The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

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